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IN THE

Supreme Court of the United States

October Term, 1943

No. 238

DANIEL W. NORRIS, EMMET L. RICHARDSON and PERRY J. STEARNS, as Executors of the Will of Fannie W. Norris, Deceased,

Petitioners.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI AND BRIEF

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show:

I. SUMMARY STATEMENT

This proceeding was commenced in the United States Tax Court, then known as the United States Board of Tax Appeals, to redetermine a deficiency of United States estate taxes assessed against petitioners, as executors of the will of Fannie W. Norris, Deceased. The petitioners, in their United States estate tax return, claimed deductions for two transfers to charity made by them (T. 4, 14, 121, 149), and the Commissioner disallowed these deductions and determined the deficiency in question (T. 14, 141, 142). The United States Board of Tax Appeals and the United States Circuit Court of Appeals for the Seventh Circuit held the two transfers not deductible. (T. 189)

Notice of deficiency was dated June 28, 1940 (T. 137).

The matter was heard by the United States Board of Tax Appeals on the 29th day of September, 1941 (T. 143), and on March 18, 1942 the decision of the Board was promulgated, reported in 46 U. S. B. T. A., 705 (T. 154-165). Due appeal was taken to the United States Circuit Court of Appeals, Seventh Circuit, June 6, 1942 (T. 2); hearing had January 14, 1943; decision made April 8, 1943; and petition for rehearing denied May 10, 1943. The opinion of the Circuit Court of Appeals is reported at 134 F. (2d) 796.

II. REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals for the Seventh Circuit that transfers to charity, conditional as of the date of death, cannot be allowed as deductions even though such condition has been performed and the event has occurred before the deduction can be allowed is in conflict with Regulations 80, Art. 47 having the force of law and with decisions of the Circuit Court of Appeals in other circuits on the same point in the cases of *Brown vs. Commissioner,* (3 Cir.) 50 F. (2d) 842; *Meierhof vs. Higgins,* (2 Cir.) 129 F. (2d) 1002; *Smith vs. Commissioner,* (1 Cir.) 78 F. (2) 897, and a number of other cases discussed in the brief submitted herewith.

2. The decision of the Circuit Court of Appeals that the transfers in question did not speak as of date of death, the same as if set forth in express terms by the will, is a decision of an important question of Wisconsin law in a way probably in conflict with applicable decisions of the Wisconsin Supreme Court, and clearly in conflict with the

law of this case as determined by a final decision of the County Court for Milwaukee County, State of Wisconsin, made in regular course of probate. (T. 150-4)

3. The decision of the Circuit Court of Appeals, that the transfers in question did not speak as of the date of death as if set forth by express provision in the will, is an erroneous decision of an important question of general law in conflict with the weight of authority.

4. The decision of the Circuit Court of Appeals that a gift to charity, dependent upon a condition precedent which occurs necessarily after death but before the estate tax return is filed and the deduction can be allowed, is not deductible for estate tax purposes, involves an important question of federal law which has not been but should be settled by this court.

5. The decision of the Circuit Court of Appeals that a gift to charity, dependent upon a condition precedent which occurs before the tax is determined is not deductible for estate tax purposes, is a decision of a federal question in a way probably in conflict with applicable decisions of this court. (T. 189)

6. The decision of said Circuit Court of Appeals that the second part of Art. 47, Reg. 80 of the Treasury Department relates to transfers subject to conditions precedent, when in fact it relates only to conditions subsequent, is an erroneous construction of a federal law, the correction of which is of great importance to the administration of estates throughout the United States. (T. 181)

7. The decision of the Circuit Court of Appeals that only by strict construction, (T. 181) and not by natural or reasonable construction, is the second paragraph of Art. 47, Reg. 80 not applicable to the transfers in question is an

erroneous construction of federal law, which it is in the public interest to have corrected.

8. The decision by the Circuit Court of Appeals that transfers to charitable corporations upon condition can only be allowed as deductions, if the condition occurs prior to the date of death, (T. 183) is an erroneous construction of federal law, the correction of which by this court of last resort is of great importance.

9. The decision of the Circuit Court of Appeals that transfers or gifts to charity cannot be contingent or conditioned upon the exercise of a discretionary power conferred upon personal representatives or other tribunal for the testator, (T. 188, 9) is an erroneous construction of federal law, the correction of which is of great and widespread importance.

10. The decision of the Circuit Court of Appeals that the powers vested in the trustees, pursuant to which the transfers in question were made, were not imperative and mandatory speaking through the will of the testatrix, but merely precatory, (T. 186-9) as if the transfers were made by the trustees from their own personal estates is an erroneous construction of Wisconsin and general law in conflict therewith.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 8062, Daniel W. Norris, Emmet L. Richardson, and Perry J. Stearns, as Executors of the Will of Fannie W. Norris, Deceased, Petitioners-Appellants, vs. Commissioner of In-

ternal Revenue, Respondent-Appellee, to the end that this cause may be reviewed and determined by this court as provided by the statutes of the United States; and that judgment herein of said United States Circuit Court of Appeals be reversed by the court, and petitioners have such further relief as to this court may seem proper.

Dated this 22nd day of July, 1943.

PERRY J. STEARNS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF COURTS BELOW

1. The opinion in the United States Board of Tax Appeals, now United States Tax Court, promulgated March 18, 1942, is reported in Vol. 46 U. S. B. T. A. 705, and the opinion of the United States Circuit Court of Appeals, rendered April 8, 1943, is reported at 134 F. (2d) 796. (T. 176)

II. JURISDICTION

1. The date of the judgment by the Circuit Court of Appeals to be reviewed is April 8, 1943, (T. 184) and motion for rehearing made April 23, 1943 was denied May 10, 1943. (T. 190)

2. The statutory provisions which are believed to sustain the jurisdiction of this court are: 28 U. S. C. A., Sec. 347, (Judicial Code Sec. 240; Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Jan. 31, 1928, c. 14, Sec. 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926), and 28 U. S. C. A., Sec. 377, (Judicial Code, Sec.

262; R. S. Sec. 716; March 3, 1911, c. 231, Sec. 262, 36 Stat. 1162.)

3. The following facts show that the nature of the case and the rulings below were such as to bring it within the judicial provisions relied on.

(a) Fannie Wells Norris, of Milwaukee, Wisconsin, died testate on April 26, 1937, a resident of said city. (T. 13) On May 3, 1937 her will was duly admitted to probate by the County Court for Milwaukee County, State of Wisconsin. (T. 13) On the same day petitioners were named as executors of said will, and on September 13, 1937 petitioners were appointed trustees under her will, and letters of trust were issued to them. (T. 13)

The will of said deceased provided, at Item 18, paragraphs (R) and (T):

> *Item Eighteen:* All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever the same may consist, and wherever the same may be, I give, devise and bequeath unto my trustees hereinafter named, the survivor of them and their successors, in trust, to have and to hold the same during the continuance of the lives of —
>
> my son, Daniel Wells Norris,
> Francis D. Weeks,
> Mabel F. La Croix,
> Helen Bradley and
> Elizabeth Durham,
>
> all of whom are named and identified in this will, and the survivors and survivor of them, and thirty (30) years after the death of such survivor.
>
> I direct that my said trustees shall have entire control and management of the trust property committed to their care, invest and re-invest the same, change investments and sell, pledge and dispose of all such trust property as they, from time to time shall deem best, and collect all moneys, principal and income, that may be owing, and dispose of said principal and income as herein directed.

(R) If and when said trustees are satisfied that they shall have in their possession trust property more than sufficient to meet in full all the previous requirements of my will, then I direct said trustees to pay out of the principal of the trust property in their possession to Columbia Hospital of Milwaukee, Wisconsin, meaning the corporation by that name conducting a hospital near Milwaukee-Downer College, a sum not exceeding Five Thousand Dollars, ($5,000). (T. 3, 26)

(T) After my trustees shall have paid to Columbia Hospital the sum of not exceeding Five Thousand ($5,000) Dollars as set forth above, I authorize and empower them whenever and as often as they are satisfied that they have in their hands ample funds to fulfill all the requirements of my said will, at their discretion and option, to pay to any worthy charitable, religious or educational corporation, association or enterprise operating in the city of Milwaukee, Wisconsin, such sums of money out of the principal in their hands as they may deem best, with the suggestion which is not mandatory, that the enterprises which I have been interested in be given the preference. (T. 4, 26) (T. 178)

On July 25, 1938 the trustees under said will became satisfied that they had trust property in their possession more than sufficient to meet all the previous requirements of the will, and paid to Columbia Hospital, mentioned in said paragraph (R), the sum of $5,000.00. On July 25, 1938 also the trustees became satisfied that they had in their hands ample funds to fulfill all the requirements of the will within the provisions of said paragraph (T), and in the exercise of their discretion and option they determined to pay and paid to Norris Foundation, a charitable corporation within the meaning of the will, money and property in the sum fixed by stipulation at $284,341.10. (T. 13, 14)

The day following, July 26, 1938, the executors filed a federal estate tax return with the Collector of Internal Revenue at Milwaukee, Wisconsin, in which they claimed deductions for said transfers to Columbia Hospital and Norris Foundation (T. 5, 14, 121, 141). Because of changes in valuations (T. 138, 139) made by the auditors for the Commissioner, and an understatement in the return (T. 5), the amount of the deduction for the transfer to Norris Foundation taken at $262,511.12 (T. 14, 121) it is stipulated that if the deduction to Norris Foundation is allowable it should be allowed at $284,341.10. (T. 14) The stipulation further provides that Columbia Hospital and Norris Foundation are corporations organized and operated exclusively for religious and charitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of either of which is devoted to carrying on propaganda or otherwise attempting to influence legislation. (T. 14) These are tests set up by Sec. 303 (a) (3) Act of 1926 (I. R. C. Sec. 812 (d)). Said deductions of transfers to these two charities, Columbia Hospital and Norris Foundation were both disallowed by the Commissioner. (T. 141)

The computation made by the Commissioner, based upon increases in valuations and disallowances of deductions resulted in a determination of additional estate tax liability or a deficiency, being the difference of $68,294.82 between the total tax found by the auditor and the tax paid shown on the return. (T. 142, 165, 171)

4. Cases believed to sustain the jurisdiction of the court are as follows:

Lau Ow Bew v. U. S., 144 U. S. 47, 125 S. C. 517.

Magnum Import Co. v. Coty, 262 U. S. 159, 43 S. C. 531.

Helvering v. Canfield, 291 U. S. 163, 54 S. C. 368.

Taft v. Commissioner, 304 U. S. 351, 58 S. C. 891.

Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 36 S. C. 357.

U. S. v. Biwabik Mining Co., 247 U. S. 116, 38 S. C. 462.

III. STATEMENT OF THE CASE

The salient facts have already been stated in the petition at heading I, "Summary" and at heading II (3) "Jurisdiction" above, which statements are hereby adopted as setting forth the necessary facts of the case.

IV. SPECIFICATION OF ERRORS

The Board of Tax Appeals, and the Circuit Court of Appeals erred in holding:

1. That transfers to charity conditioned upon an event to occur after death cannot be allowed as deductions in determining United States estate taxes, where the condition has been performed before the deduction can be allowed, as provided in Art. 47, Reg. 80. (T. 183)

2. That the first paragraph of Art. 47, Reg. 80 does not have the force and effect of law binding upon the Commissioner, and in effect nullifying the provision requiring him to allow the deduction of transfers to charity made before the deduction can be allowed. (T. 181)

3. That the second paragraph of Art. 47, Reg. 80 relates to conditions precedent when the natural and reasonable construction of said paragraph limits its application to conditions subsequent. (T. 181)

4. That charitable transfers to be deductible cannot be made contingent upon a discretionary event to occur after death and which does occur before the deduction can be allowed. (T. 188)

5. That the transfers in question do not relate back to the date of death and speak as if expressly set forth in testatrix's will and in effect that the doctrine of relation cannot be indulged in to support the purpose and intent of Congress. (T. 183, 8)

6. That the discretionary powers exercised by the trustees are not imperative and mandatory testamentary dispositions but mere precatory or personal transfers. (T. 18

7. That the executors and trustees are not the personal representatives of the testatrix, and that their discretionary acts within their lawful powers given by the will are not testatrix's transfers within the meaning of the Act of Congress. (T. 188, 9)

8. That the testamentary character of the transfers in question is not to be determined by Wisconsin law. (T. 18

9. That the Wisconsin law of the case, as determined by the County Court for Milwaukee County, State of Wisconsin, does not require the allowance of the deductions in question. (T. 185)

10. That Columbia Hospital, the beneficiary under Item 18, paragraph (R), could not have compelled the trustees to exercise their discretion, and (T. 189) that the discretionary act, when completed, was not the act of testatrix.

11. In effect that Norris Foundation, after the trustees exercised their discretion and designated it as beneficiary under Item 18, paragraph (T) of the will, could not compel the execution of such designation, as the testamentary act of deceased. (T. 185-9)

V. SUMMARY OF ARGUMENT

Point A. The Commissioner has no discretion to deny petitioners' deductions.

Point B. Commissioner's regulations having force of law provide a limited period after death for charities to meet conditions of will for allowance of deductions.

Point C. Charitable intent of Congress being aided legal presumption of relation back should be applied.

Point D. Wisconsin law determines that the transfers in question were imperative and relate back to date of death.

Point E. Certiorari should be granted.

VI. ARGUMENT

A. *The Commissioner has no discretion to deny petitioner's deductions.*

Where a power is given to public officers the statutory language is peremptory whenever the public interest or individual rights call for its exercise. What a public officer is empowered to do for others he must do. Therefore, if the law requires the deduction of the transfers to charity in question the Commissioner has no discretion but must allow the deductions in the computation of federal estate taxes due from this estate.

Supervisors vs. U. S., 4 Wall. 435, 18 L. Ed. 419.

Mason vs. Fearson, 9 How. 248, 13 L. Ed. 125.

The act in force at the time of the death of Fannie W. Norris was Revenue Act of 1926, effective February 26,

1926, as amended by: Revenue Act of 1928, effective May 29, 1928; Revenue Act of 1932, effective June 6, 1932; Revenue Act of 1934, effective May 10, 1934; Revenue Act of 1935, effective August 31, 1935, and Revenue Act of 1936, effective June 22, 1936. (C. 27, 44 Stat. 9-131; C. 852, 45 Stat. 791-883; C. 209, 47 Stat. 169-289; C. 277, 48 Stat. 680-772; C. 829, 49 Stat. 1014-1028; C. 690, 49 Stat. 1648-1756.)

At testatrix' death Sec. 303 of said Act, as amended, at Subsection (a) (3) (I. R. C. Sec. 812 (d)) provided, (omitting paragraph not material here):

> "For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> (3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals."

By this deduction Congress sought to encourage gifts

to charity by encouraging testators to make provisions for such gifts.

Y. M. C. A. vs. Davis, 264 U. S. 47, 50; 44 S. C. 291, 292; 69 L. Ed. 558.

Edwards vs. Slocum, 264 U. S. 61, 63; 44 S. C. 293; 68 L. Ed. 564.

U. S. vs. Provident Trust Co., 291 U. S. 272, 285; 54 S. C. 389, 392; 78 L. Ed. 793.

In the latter case, Congress was not assumed to have meant to leave its primary aim to be diverted by a purely arbitrary presumption. So here the aim of Congress should not be diverted by administrative disregard of an ancient and reasonable presumption discussed below supporting such aim. As the court below said:

> "* * * Congress intended to reduce the basis of said estate tax by such amounts as were given to charity. We believe also that the Congressional intent was to prefer charity gifts to estate taxes. It was a case of absolute priority. This legislative intent should not be whittled down by judicial construction. If courts are to respect this legislative expressed intent to encourage gifts to charity, we should not approve of the practice of the Commissioner of resolving doubts in favor of the government."

B. *Commissioner's Regulations Having Force of Law Provide a Limited Period After Death for Charities to Meet Conditions of Will.*

The Revenue Act of 1926, quoted above, follows substantially the language of the Revenue Act of 1924, approved June 2, 1924, (c. 234, 43 Stat. 253-355), and the Revenue Act of 1921, effective November 23, 1921, and the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057). The Revenue Act of 1918, last mentioned, at Sec. 403 (a) (3) provides: (omitting last sentence not deemed material)

> Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—(a) In the case of a resident, by deducting from the value of the gross estate—
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes."

Under this section the Commissioner issued Regulations 37, approved Aug. 8, 1919 which, at Art. 56, contained provisions with respect to conditional bequests, as follows:

> "Art. 56. Conditional bequests.—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed."

This regulation considers, in the first sentence, conditions precedent and, in the second sentence, conditions subsequent. Due to the marked difference between these two varieties of conditions such difference in treatment is necessary. The regulation broadly provides that as to conditions precedent the precedent event must occur before the deduction can be allowed. The deduction can be allowed up to the time of the final assessment of estate taxes (I. R. C., Sec. 874 (a)) which is four years and three

months after death, at the outside, generally. (See also I. R. C., Sec. 821; Reg. 80, Art. 63)

The second sentence, while relating to conditions subsequent, should be read in the light of the preceding sentence so that if the event which confirms the gift has occurred, or the event defeating it has been disclaimed or made impossible, before the deduction can be allowed, then the gift, by the terms of the bequest, is no longer subject to be defeated. This provision (Reg. 37, Art. 56) relating to conditions subsequent is not dependent upon the mere "terms of the bequest" where the facts showed the uncertainty created by such terms to be not "appreciably greater than the general uncertainty that attends human affairs."

> *Ithaca Trust Co. vs. U. S.*, 279 U. S. 1514; 49 S. C. 291; 73 L. Ed. 647.

The Revenue Act of 1921, effective Nov. 23, 1921, we understand was enacted at a time when Art. 56, Reg. 37 was in effect, as quoted above. Accordingly, we believe Congress, by the enactment of the Revenue Act of 1921, adopted Art. 56, Reg. 37 as law.

> *Helvering vs. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115; 59 S. C. 423, 426.

On July 27, 1922 the Commissioner issued Reg. 63 which, at Art. 50, revised the provisions with respect to conditional bequests to read substantially as they do in Art. 47, Reg. 80, and as in the intervening Regulations 68 and 70, except that the word "where" was changed to "if", the sense being the same.

In the *Reynolds Tobacco Co.* case, it is said: (p. 116)

> "Since the legislative approval of existing regulations by re-enactment of the statutory provision to which they appertain gives such regulations the force

of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed."

The changes in the Regulations at Art. 50, Reg. 63 and Reg. 68 and Art. 47, Regulations 70 and 80 do not, in our opinion, substantially change the meaning or effect of Art. 56, Reg. 37. At any rate, the language upon which petitioners rely permitting the deduction of conditional charitable bequests, if the act occurs "before the deduction can be allowed" was retained throughout all the regulations which historically might have any bearing upon the regulations in effect at testatrix' death. These words appear in Art. 47, Reg. 80 in effect at testatrix' death.

Art. 47 of Commissioner's Reg. 80, reads as follows:

"If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

As we read Art. 47, Reg. 80 the first paragraph pertains to conditions precedent such as those now before the Court, and the second paragraph to conditions subsequent. The second paragraph is to be read in the light of the first so that if the condition subsequent which might divert the property from charity or defeat the charitable gift has occurred before the deduction can be allowed, then the deduction shall be allowed.

This construction of the regulations is supported by the latest regulations of the Commissioner, Reg. 105, Sec. 81.46, which read:

> Conditional bequest.—If *as of* the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a *precedent* event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable. (Emphasis ours)
>
> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The new second sentence of the first paragraph as well as the old second paragraph retained in Regulations 105 above, both relate to conditions subsequent.

It will be noted that the first paragraph now particularly speaks of "a precedent event," and uses "as of," the words of relation back, instead of fixing the time of the occurrence of the event as any time "before the deduction can be allowed." Also, the deduction is to be allowed "unless the possibility that charity will not take is so remote as to be negligible," or as to conditions subsequent "highly improbable." The Commissioner thus adopts the practical construction along with the common rule of relation back apparently. As this change in the regulations

was made to conform to court decision and without any change in the statute quoted above, we believe these regulations are considered by the Commissioner to be declaratory of the law and so relate back to the death of the decedent in the present case. It is clear in this case that as the Regulations provide "the possibility that the charity will not take is so remote as to be negligible." The charities did take and there is no possibility that they will not take. The act of Congress, as it stood when Reg. 105 was issued, is not substantially different from the Revenue Act of 1926, quoted above, so far as the case now before the court is concerned. The change in the regulations was required by judicial decisions, some of them made under revenue acts dating back to 1918. The Commissioner still retains the distinction between conditions precedent and subsequent.

The Revenue Act of 1942, Sec. 408 (a) added parenthetically, after the word "transfers" in Internal Revenue Code Sec. 812(d), the words:

> "(including the interest which falls into any such bequest, legacy, devise, or transfer, as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return)."

Such disclaimer may relate to conditions precedent or subsequent, or may be entirely independent of any conditions, thus:

Condition precedent—If a transfer is given to charity if A disclaims, then his disclaimer would be the condition precedent.

Condition subsequent—Or if the transfer be to charity subject to the power of A to defeat the gift by the exercise of certain rights given him by the will, A might disclaim the right to exercise these powers.

Not conditional—Or if the law of the state should prohibit or limit gifts to charity and provide that the heirs should be beneficiaries of the limitation, the heirs might disclaim the benefits of the statute.

The express language of this amendment does not relate to conditions, and so perhaps it is not pertinent to this case. It does not cut down the time provided by Art. 47 in the absence of disclaimer. The court below says: (T. 188-9)

> "We are inclined to the view that the amendment was to avoid controversy and to make it clear that Congress desired no obstacles placed in the path of the charitably inclined. It dealt with the future—did not affect wills or trust agreements which became effective before its enactment. It has no significance in this case."
>
> *Norris vs. Commissioner,* 134 F. (2) 796, 803.

Yet, it is the first approach in any Act of Congress to a specific handling of the question of conditional bequests. It gives legislative support to the regulation of the Commissioner that the condition shall not prevent the deduction provided by law if it occurs before the deduction can be allowed. It has limited the time set by the Commissioner for the allowance of deductions when the "remote possibility" or "high improbability" is aided by disclaimer. Congress now fixes the deadline as to irrevocable disclaimers for tax purposes at a time "prior to the date prescribed for the filing of the estate tax return." In the instant case the condition necessary for the transfer to charity occurred not only prior to the time when the deduction could be allowed, but also prior to the due date of the filing of the estate tax return (T. 13). At all times, until the Revenue Act of 1942, the Act has in terms broadly allowed the deduction of all transfers to charity, and the amendment of 1942 in terms extends the deduction by per-

mitting the inclusion of transfers to charity arising as the result of an irrevocable disclaimer. Previously, the law, by regulation, extended only to transfers dependent on contingencies where the contingency occurred in due time, and, by court decision, where the possibility of the contingency not arising was so remote as to be negligible *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151; 49 S. C. 291; 73 L. Ed. 647, or the diversion from charity highly improbable. *U. S. vs. Provident Trust Co.*, 291 U. S. 272, 285; 54 S. C. 389, 392; 78 L. Ed. 793. The present case arises because of the failure of the Commissioner to apply the regulations to facts falling within their terms.

The Commissioner has at all times recognized, in his regulations, that gifts to charity may be deducted even though conditional if the event occurs in time. This regulation, so clearly in accord with the broad purpose of Congress, would turn the manna of Congress into stone if it were to be held that conditions contained in wills which usually are published for the first time at death must nevertheless have been performed at or prior to death. The reasonable interpretation and construction is that expressly adopted by the Commissioner (but not followed by him) that if the condition has occurred prior to the time when the deduction can be allowed, then the deduction shall be allowed.

The court below (T. 184) (p. 801) quotes an article on "Federal Death Tax" by John E. Hughes, Esq., in which he says:

> "It is the opinion of the author the rule should be that if at the time of the ascertainment of the tax, the condition has been complied with, then the bequest should be deductible, otherwise not. * * * The establishment of the rule herein advocated will result in the allowance of a deduction obviously within the spirit of the beneficient legislation and in the accomplishment of substantial justice."

In our opinion the author does not take a position sufficiently strong. What he should have said is that the Commissioner in Regulations approved by Congress has from the beginning, since 1918 in terms provided for the deduction where the condition has been complied with "before the deduction can be allowed."

At 47, Yale Law Journal, 1354, 1359, it is said:

> "It is highly legalistic to deny deductions for conditional bequests to charity when by the time of assessment the conditions had been fully performed."

In Federal Income Gift and Estate Taxation, by Jacob Rabkin and Mark H. Johnson, of the New York Bar (looseleaf publication in 1942 of Matthew Bender & Company), the authors say at G7, Charities, Sec. 5, p. 3516:

> In all cases, the question of whether the property passes under the decedent's will is one of local law. Dudley S. Blossom Estate, 45 BTA 691. The deduction will not be denied where the specific charitable beneficiaries are not designated, the choice being left to the trustees. Jacob Wasserman Estate, BTA Memo. Dock. 106420, C. C. H. Dec. 12-424-E.

As the court below says, (T. 185) (p. 801) the Commissioner finds important "the necessity of easy, accurate determination of the precise tax due from the estate * * *." The court also says that loop holes should not be permitted, and continues: "Neither objection—to-wit, uncertainty or possible avoidance of the charitable bequest — is here present."

The Revenue Act is very broad in permitting the deduction. The act is not confined to transfers unconditional at death. To restrict the generality of the act invades the legislative power. Yet practical considerations inherent in the law required the Commissioner to fix the greatest

reasonably possible time limit within which a conditional gift to charity must become definite and certain. He fixed the last possible hour within which it can be allowed. Article 47, Regulations 80, therefore, in effect becomes a proviso to the Act.

In "A Discourse upon the Statutes" edited by Samuel E. Thorne of Northwestern Law School, published 1942 by Huntington Library, San Marino, California, the original author states:

> "The provisoes in statutes are the laste parte, and they make a lawe, for in them commenlye the wordes are by aucthorytie before sayde. Of these statutes, yf any be to take advauntage, he muste shewe that he is not conteyned wythin the provisoes, yf they be to his disadvantage."

Also, to take advantage, he must show that he is contained within the proviso if that be to his advantage. The deductions claimed by petitioners could not possibly be disallowed before their estate tax return was duly filed. The conditional event fixed by testatrix occurred before their return was filed (T. 13). Therefore they come within the Commissioner's proviso. To shorten the limit of the proviso later approved by Congress, unduly restricts the broad inclusiveness of charities intended to be benefited by Congress.

The Commissioner and the courts below have denied petitioners the benefit of their conformity to the proviso. The court below (pp. 799, 800) says: (T. 181)

> "Yet petitioners' construction of paragraph one brings us in direct collision with paragraph two of Article 47, which states that if a donee or trustee is empowered to divert the property to a recipient, a direct gift to whom, by the decedent, would not have been deductible, it shall be deemed nondeductible.

A careful reading of this second paragraph of Article 47 would indicate it meant to cover specific charitable bequests made by the decedent, but subject to be defeated by the trustee.

A strict construction of paragraph 2 does not make it applicable to the instant case because here the transfer of the residue was to trustees, of funds to be administered as they directed. There was no power of *"diversion"* of the fund from a testamentarily designated deductible bequest to a nondeductible bequest, but rather a choice between different beneficiaries of a designated class (Milwaukee "charitable, religious or educational association") to be made by the trustees."

We have no quarrel with what the court says in the quotation just made, but rather with the result reached by the court in spite of its statements quoted. The erroneous construction of paragraph two which treats the act of petitioners in nominating Columbia Hospital and Norris Foundation as a diversion is reflected in the quotation by the court from its earlier decision, *Knoernschild vs. Commissioner*, 7th Cir., 97 F. (2) 213, 215, where there was a clear gift to charity affected by an absolute power to divert. The gift to Holy Angels Academy was clearly subject to a condition subsequent. The adoption by the court below of the practical results of its earlier decision is an error which does not conform to the expressions of the court, unless the court intended to say that while a strict construction of paragraph two of the regulations does not make it applicable to the instant case a liberal or reasonable construction would do so. We do not believe the court intended to imply this, and we believe that the reasonable and liberal construction accords with and is no different from what the court says is a strict construction.

Commissioner's phrase "empowered to divert" used in said paragraph 2 is not one of art. So far as we discover

it is unknown to the law of trusts or wills. From 13 *Words and Phrases*, 56, and pocket part, 1942, p. 7, it does not appear that the phrase "power to divert" or the word "divert" has been used in the sense of the regulation. The word "power" is inappropriate to the word "divert" since from the cases there collected it appears that "diversion" is usually done illegally or in excess of power. It involves divestiture. Some person or fund must have title or right before there can be diversion. So payment to Columbia Hospital and Norris Foundation was not a diversion and did not "divert" from charity. Their rights arose from "the performance of an act," (i.e., exercise of the power to pay under paragraphs (R) and (T) of the will) as contemplated by the first paragraph of Art. 47, Reg. 80 and not a power to "divert" under the second paragraph. The words "power to divert" must be used in the sense of a power to defeat or revoke, in whole or in part. 3 *Restatement of the Law of Property*, 1818, Sec. 318(2) says:

> "The term power of appointment does not include a power of * * * revocation * * *."

So the two paragraphs of Art. 47, Reg. 80, are mutually exclusive and not to be confused. Power to appoint to charity is treated at 2 *Restatement of the Law of Trusts*, 1178, Sec. 382. In the pocket supplement of *Wisconsin Annotations*, p. 197, are collected cases in which the trustees had the power to select beneficiaries. The trustees in selecting Columbia Hospital and Norris Foundation were not exercising a "power to divert", as the court below seems to assume. (T. 181)

C. *Charitable Intent of Congress is Aided by Legal Presumption of Relation Back.*

This court has refused to permit the Commissioner to

defeat the deduction of a transfer to charity merely because of a presumption claimed to be irrebuttable, but which the record showed was contrary to fact.

> *U. S. vs. Provident Trust Co.*, 231 U. S. 272, 281, 282; 54 S. C. 389, 391.

It follows that if there are presumptions in the law which support the purpose of Congress, such presumptions should be applied in the absence of practical reasons to contrary. The court below does not treat, adequately, the effect of this presumption, but the court does quote (p. 800) the language of a case which supports the petitioner's position, as follows: (T. 183)

> But where a power of appointment is discretionary, the power being exercised relates back to the period of time of the settlement of the power. That is, in this case, to the date of the testator's death. Therefore, when the power was once exercised, the church took the gift from the settlor, the creator of the power, and not from the trustees themselves, for the reason that the deed created no estate in any one except through the exercise of the power to appoint under the terms of the deed. The tribunal, authorized to appoint, having exercised the power, their act relates back to the settlor and the estate passed from him, as the creator of the power, and not from the trustees. * * *
>
> *Brown vs. Commissioner*, 3 Cir., 50 F. (2) 842, 846.

On this point the 7th and 3rd Circuits clearly disagree. The court below (p. 800) (T. 182) quoted Davison vs. Commissioner, 2 Cir., 81 F (2) 16, 18 as recognizing that the exercise of a power will "for some purposes relate back to the date of the death of the original testator," and might for tax purposes, if timely.

It was stated in *Farmers' Loan & Trust Co. vs. Minnesota*, 280 U. S. 204, 212; 50 S. C. 98, 100:

> Taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequennces.

An exemption in aid of charity should not depend on considerations wholly unreal and illusory.

> *City Bank Farmers' Trust Co. vs. U. S.*, 2 Cir., 74 F. (2) 692.

It is unreal to deny the deductions in question merely because as to Columbia Hospital the trustees in their discretion might have given less and as to will item 18 paragraph (T) (T. 26) they might have given less or to other charitable purposes. The money was promptly paid to the charities. The Court is confronted with a fact and need not resort to theory. The Court below says (p. 802): (T. 184)

> "To the trustees, there never was doubt as to Mrs. Norris' wishes, or their duty. Filial respect for the mother's wishes may have influenced prompt and decisive action by one trustee. But the fact remains that the trustees seemingly viewed the trust as one clearly requiring them to make disposition of the bequest to Milwaukee charities."

In *Brown vs. Commissioner*, 3 Cir., 50 F (2) 842, the trustees were guided in their discretion by the standard of "the ideals of the settlor" known to them. Here the standards are set up in item 18 paragraph (T) of the will itself.

The presumption that one who takes under the exercise of a power takes from the creator of the power was early stated in 4, *Kent's Commentaries*, 327:

> The party who takes under the execution of the power, takes under the authority, and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power, and the instrument executing the power, had been incorporated in one instrument.

The doctrine of relation back is applied to the issuance of letters testamentary. It is stated at 26 A. L. R. 1359, 1360:

> The doctrine that whenever letters of administration or testamentary are granted they relate back to the intestate's or testator's death is an ancient one. It is fully 500 years old. In the Year Book, 18 Hen. VI. 22, pt. 7, there is a case reported of an administrator maintaining trespass for acts done between the death of his intestate and the issue of his letters.
>
> The doctrine has been accepted with virtual unanimity, since it was promulgated, in a long line of cases."

The same principle of relation back applies to the acts of one having a discretionary power under a will.

Brown vs. Commissioner, 50 F. (2) 842, 846.

In *Chanler vs. Kelsey*, 205 U. S. 466; 27 S. C. 550, 552; 51 L. Ed. 882, the court says:

> In support of this contention, common-law authorities are cited to the proposition that an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power; that the beneficiary takes, not under the execution of the power by the donee, but by authority and under grant from the grantor, in like manner as if the power and the instrument which created it had been incorporated into one instrument. 4 Kent, Com. 327; 2 Washb. Real Prop. 320.

The court then held that:

> "However technically correct it may be to say that the estate came from the donor, and not from the donee, * * *."

and

> "Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, * * *."

the exercise of the power was a taxable fact, and the New York law imposing a tax upon the exercise of a power of appointment, was valid. While the common-law doctrine of relation back was disregarded in this case, involving the New York inheritance tax, yet the reasons for its disregard do not exist in the present case, but on the other hand there are strong reasons why the principle should be applied in support of the intent of Congress.

The court below (p. 798) erroneously states the contention of petitioners, as follows: (T. 179)

> Petitioners also contend that the making of the gift through the selection of trustees to designate the charities which were to receive the estate did not make the gift contingent. It is argued that the gift to charity was absolute, even though the beneficiaries were not named, and the amount each was to receive was left to trustees, in whose judgment the testatrix had great confidence.

What petitioners contend is that the transfers to the charities in question were conditional until the trustees exercised their discretion, at which time their acts related back to the date of the death of the testatrix and became her act as absolutely as if provision therefor had been made in her will. Becoming thus absolute the beneficiaries, designated by their discretionary acts, had absolute and enforceable rights to the transfers. Furthermore their duty to exercise their discretion in some manner was imperative by Wisconsin statute.

The trustees having exercised these mandatory trusts for charity, they were absolute and mandatory for the full amounts designated by them. This court has recognized the principle of relation back in a case in which the Commissioner "urged that taxes should not be enforced by what occurs after the taxable event," and "that a compromise occurring after the decedent's death, which is the 'taxable

event' under an estate tax, should not be considered." This court said, in answer to the Commissioner:

> "Whatever may be the general rule in this respect, this Court has clearly recognized, * * * that events subsequent to the decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under Sec. 302(f). * * * The subsequent renouncement by the appointees of the right to receive by appointment and their election to take as remaindermen in default of appointment were held by this Court to place the property subject to the power outside the scope of Section 302(f)."

Helvering vs. Safe Deposit and Trust Co. of Baltimore, 316 U. S. 56, 65; 62 S. C. 929, 930.

Helvering vs. Grinnell, 294 U. S. 153; 55 S. C. 354; 79 L. Ed. 825.

D. *Wisconsin Law Determines that the Transfers in Question Were Imperative and Relate Back to Date of Death.*

The court below states (p. 801) that: (T. 185)

> "The law of Wisconsin governs the construction of this will. The Federal law governs as to the construction and the application of the Federal tax statute, to the estate, the nature and character of which has been fixed by Wisconsin law. *Blair vs. Commissioner*, 300 U. S. 5, 10; 57 S. C. 330; 81 L. Ed. 465.
>
> In other words, the Federal statute grants and defines its gift exemptions. It could have excluded all gifts. It could and did define the gifts it exempted from Federal Estate taxes. Those exemptions thus specified, may not be broadened by Wisconsin decisions.
>
> While we must look to the Federal statute to ascertain the estates which are exempted from taxation, it is the local law which determines the character and nature of the estate which the will creates."

By Federal law, executors were required to show that the charitable natures of the transferees complied with the exemption. This point is stipulated. (T. 14) The Federal law makes the proviso, imposed upon the Act of Congress by the Regulations, that where the transfer is conditional, the condition must have occurred before the deduction can be allowed. Petitioners having complied with the deduction tests fixed by Federal statute, the Board of Tax Appeals, below nevertheless denied the deduction because the transfers were not received "through any act of the testator."

Estate of Fannie W. Norris, 46 B. T. A. 705, 712.

The Circuit Court of Appeals denied the deduction below (p. 802) because: (T. 188)

> "This court, though divided, is of the opinion that Mrs. Norris failed to provide in her will a trust fund which was exempt from taxation * * *.
>
> "In reaching this conclusion, as to which, one member of the court cannot agree, the persuasive factors determinative of the result are: (1) No amounts were specified by testatrix; (2) No charity was named; (3) The language of the will (T) above-quoted, "at their discretion and option" negatives the basis upon which a gift is necessarily dependent.
>
> "The third reason is one upon which the determination of the case largely turns. The precatory language of the will in other places, might have saved the bequest, but for this language of paragraph T of the will. These words, 'at their discretion and option' define, in the opinion of the majority of the court, the character of the gift. Giving these words their only legitimate meaning, there is no justification for our stressing the meaning of the other words used in the same paragraph, to-wit, 'authorize and empower.' It is impossible to neutralize the last words used by the testatrix in this paragraph and convert a kindly wish into a mandatory trust."

Again the court said (p. 801), at the close of discussion under headnote 3: (T. 185)

> "The only serious objection is that the testatrix' gifts to charity are not absolute. They did not pass directly from the testatrix to the charity. The necessity (or contingency) of action by the trustees was present."

The question of whether a provision is testamentary, and whether precatory or mandatory, is to be determined by state law.

By Wisconsin law, the transfers in question were testamentary and mandatory. It is untrue, as stated by the Board of Tax Appeals, that the transfers were not due to any action of the testator. The trustees would have had no authority to make the transfers but for the will. The provisions of the will were an acceptance of the invitation of Congress within the meaning of *Y. M. C. A. vs. Davis*, 264 U. S. 47, 50; 44 S. C. 291, 282, when Congress said to testatrix "If you will make such gifts, we will reduce your death duties * * *."

Wisconsin's Statute on "Powers" was adopted from New York, and Secs. 232.23 and 232.24, Wis. Stats., read as follows:

> "232.23 Trust powers imperative. Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative and imposes a duty on the grantee the performance of which may be compelled by action for the benefit of the parties interested.
>
> "232.24 Effect of right of selection. A trust power does not cease to be imperative when the grantee has the right to select any, and exclude others, of the persons designated as the objects of the trust."

In *Will of Doe*, 232 Wis. 34, 39, seq., cited by the court below, the court discusses these sections and says:

> "Powers in trust are presumably imperative rather than purely discretionary." The court goes on to indicate that purely discretionary powers are not lightly to be imputed to the testator.

In *Osborne vs. Gordon,* 86 Wis. 92, 94, 97, a provision authorizing the trustees to invade principal was held to confer an imperative power not affected by the fact that the trustee had discretion as to the degree of invasion, provided such discretion is exercised reasonably, and not abused, the court saying:

> "Such a discretion is by no means unlimited."

In *Will of Doe,* 192 Wis. 333, 335, 336, the court says that in order to create a trust the intention of the testator must be manifest and mandatory, but such a trust may be created by precatory language in a will, and the words "having full confidence" and "it is my wish" are sometimes mandatory.

Will of Platt, 205 Wis. 290, 296, holds:

> "Precatory words in a will are to be given effect as conferring rights whenever they express an intent as distinguished from a mere desire; so far as they denote an intent of the testator they are mandatory; they are imperative if it appears that they were intended to create an obligation."

and quotes *Will of Olson,* 165 Wis. 409, 411, saying:

> "Where the intention of the testator is clear, and where in order to carry out such intention it is necessary to follow precatory words, then such words are not advisory, but mandatory.

The Circuit Court of Appeals below regarded the language "at their discretion and option" in the will, Item 18 (T), (T. 27) as precatory language. (T. 182-9) As the cases show the trust may nevertheless be imperative or mandatory. The petitioners, as trustees, were not absolute owners under mere moral obligations as implied by the footnote citations

of the court below (p. 802) from *Bogert on Trusts and Trustees,* Vol. 1, Sec. 48, and Vol. 2, Sec. 324. They were trustees.

Item 18, paragraph (S) (T. 26) of the will we do not believe has any bearing on this case: First, because the record does not show that the trustees took any action thereunder; and second, because paragraph (T), standing alone, is by statute, we believe, an imperative trust with respect to which the trustees could be compelled to exercise their discretion reasonable in some manner.

The trust created by Item 18 of the Will of Fannie W. Norris, (T. 23) is mandatory, not precatory. Sec. 25 of the Restatement of the Law of Trusts quoted by the court below (p. 802) therefore has no application. (T. 187)

The discretionary powers given the trustees were imperative or mandatory, but if the trustees had failed or declined to act, it is very true that they could not have been forced to act "before the deduction can be allowed." Under the law of trusts they were entitled to more time than the tax law provided at Art. 47, Reg. 80.

The court below agrees (p. 803) (T. 189) that the trust, under Item 18 (R) was absolute and mandatory, but for no more than one cent. This is not in accordance with the rule which requires discretion to be exercised reasonably and not arbitrarily. Such mere token or illusory exercise of discretion would, we believe not be judicially approved.

1. Restatement of the Law of Trusts 483-9, Sec. 187h. and Sec. 187j.

2. Restatement of the Law of Trusts 1178 Sec. 382 in the Wisconsin annotations at p. 197 cites to the effect that

equity will compel exercise of discretion without abuse:

Dodge vs. Williams, 46 Wis. 70.

Sawtelle vs. Witham, 94 Wis. 412.

Hood vs. Dorer, 107 Wis. 149.

Wisconsin recognizes that the personal representatives of a decedent may exercise the same powers, rights, and privileges as the decedent.

Estate of Gallun, 215 Wis. 314, 320.

In *Will of Asby,* 232 Wis. 481, 489, the court said of an executor, "he is interested as the chosen representative of the deceased to see that her will is carried into effect," and quoting *Cowan vs. Beans,* 155 Wis. 417, 418, to the effect that the executor is the representative of a testator charged with a duty of seeing that his will is carried into effect, saying:

> "In our opinion it may be said with equal soundness that an executor is charged with the duty of seeing that the intentions of the testatrix, as he in good faith believes them to be, are carried into effect."

The intentions of testatrix, as reflected by the acts of her nominees, the trustee-petitioners, in the light of Wisconsin Statutes and cases, is not lightly to be disregarded by the Commissioner. The executor represents the person of his testator.

Fox Film Corp. vs. Knowles, 261 U. S. 326, 330, 43 S. C. 365, 6, 67 L. Ed. 680.

The case of *Taft vs. Commissioner,* 304 U. S. 331, 355-6, does not negative our claim that the state law not only creates legal interests and rights, but also determines when such legal interests and rights were created. *Taft vs. Commissioner, supra,* held that whereas under the Revenue Acts of 1918 and 1921 the Commissioner was bound by the state law in determining the deduction of claims "allowed

by the laws of the jurisdiction * * * under which the estate is being administered" the act of 1924 permitted the deduction of claims only to the extent incurred for fair consideration. The court held that Congress intended to narrow the class of deductible claims. It did not overrule the principle of *Lyeth vs. Hoey*, 305 U. S. 188, 193 59 S. C. 155, 158, in which the court expressly held:

> "Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction. * * * The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction."

The state court decisions cited by us therefore show that the will is to be construed as including the transfers to Columbia Hospital and Norris Foundation to the same extent as if the transfers made had expressly been provided in the will. Anything said on the subject in *Davison vs. Commissioner*, (2 Cir.) 81 F. (2d) 16, 18, is *obiter dicta*, because as stated:

> "Here the charitable bequests remained *in vacuo* for a long time, and not until six years had elapsed was the ambulatory power to divert the $400,000.00 from charitable objects renounced by the donee of the power in a way that was irrevocable."

The performance of the condition necessary to the deduction of the charitable bequest occurred after the time when the deduction could be allowed and, therefore, fell outside the proviso of the regulations.

Mississippi Valley Trust Company vs. Commissioner, 8 Cir., 72 F. (2d) 197, 199, was a case where the taxpayers secured a construction of a will in "an uncontested consent order wherein this particular matter was not directly called to the attention of the court." The court says (p. 200):

> "State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law."

The court held that no power had been created in the will and consequently the gift was not testamentary since, as the Board of Tax Appeals held, a gift to be deductible must by the Revenue Act be testamentary. A gift clearly not so cannot be made so by an *ex parte proceeding.*

Since the testator, (Firmin Desloge) with respect to the charitable gifts, said: "I therefore make no such bequests herein." (72 F. (2) 197, 200), what the court says about testamentary bequests is *obiter dicta.* The court said (p. 199) that there are three so-called "powers", and "The first of these is where a power exists coupled with a mandatory duty to exercise it."

While there was evidence in the *Mississippi Valley* case to support the finding of the Board of Tax Appeals that the case was not testamentary, yet in the instant case, there is no such evidence. As a matter of law, there being no evidence to support any finding by the Board of Tax Appeals that the transfers to Columbia Hospital and Norris Foundation were not testamentary, such transfers were and are testamentary.

We have shown above that petitioners herein, as trustees, were bound to exercise their discretionary power because, by Wisconsin statute, the power is imperative. This does not mean that they had to exercise it within the time of the proviso (Art. 47, Reg. 80) nor that they had to exercise it in favor of Norris Foundation, but since it was mandatory and they have exercised their power by an irrevocable act of discretion, Commissioner and courts must take the factual situation as thus unalterably developed, and apply the law and the proviso accordingly.

The case of *Robbins vs. Commissioner,* 1 Cir., 111 F. (2d) 828, 832, is not controlling in the present case since the transfer to Amherst College was not testamentary, court pointing out that "whatever right Amherst College has now came to it through the compromise agreement and not under the will of the testator."

This case purports to overrule *Smith vs. Commissioner,* 1 Cir., 78 F. (2d) 897, 898, but we fail to see any inconsistency or necessity for overruling since, by Massachusetts law, the beneficiary of the compromise agreement took as purchaser from those who received title under the will. *Lyeth vs. Hoey,* 2 Cir., 96 F. (2d) 141. Whereas, in Rhode Island the charitable beneficiary claiming under the compromise agreement took under the will.

Smith vs. Commissioner, 1 Cir., 78 F (2d) 897, 898.

The court below is not entirely correct in saying, (p. 802): (T. 185)

> "No Wisconsin court was ever called upon to construe this will or define this trust."

It is true, there was no construction proceeding, but there was a proceeding to determine inheritance taxes as there is in every estate of sufficient size. Such proceeding was in regular course and the state was represented by counsel for the State Tax Commission, the public administrator of Milwaukee County (T. 150). The County Court for Milwaukee County was required to determine whether as of the date of death there were transfers made by the decedent to charitable corporations within the meaning of Sec. 72.04, Wis. Stats. The court expressly found the names of the legatees and devisees, the distributive share of each, and the exemption to which each was entitled (T. 151), and among others listed Columbia Hospital, a charity, as all exempt and paying no tax, and Norris Foundation, a charity, as all exempt and liable for no tax. The Wisconsin

inheritance tax law, like the Federal, is computed upon the value of the estate at the time of decedent's death, and the exemptions provided by statute lower the value of the taxable transfers as of that date.

Estate of Benjamin, 235 Wis. 152, 159.

To be sure, the Wisconsin tax is a tax upon the right to receive. This right, however, must be one arising under the will of the testator, since charitable transfers could not arise by operation of intestate laws of descent and distribution, except perhaps by escheat. Under Federal law, "The estate, so far as may be, is settled as of the date of testator's death. * * * The tax is on the act of the testator not on the receipt of property by the legatees."

Ithaca Trust Company vs. U. S., 279 U. S. 151, 155; 49 S. C. 291.

The latter quoted statement is true with this qualification that necessarily, by the terms of the Revenue Act, at Sec. 303 (a) (3), and Art. 47, Reg. 80, the deduction there provided for depends upon the receipt of property by the charitable legatee. To warrant the deduction there must be an act of the testator, and a receipt by the legatee. Columbia Hospital and Norris Foundation qualify in both respects.

The order of the County Court fixes, as the law of Wisconsin for this case, that these payments were testamentary speaking from the date of death of the decedent, and mandatory since if merely precatory they would not have been allowed as deductions under the Wisconsin law any more than under Federal law.

Estate of Johnston, 186 Wis. 599, 601-605.

While there were no precatory words in this cited case, the result would or should have been the same had there been.

The payments to Columbia Hospital and Norris Foundation were recognized as transfers in the order of the County Court of Milwaukee County determining inheritance tax. (T. 150-4)

By Sec. 72.01 (Wis. Stats.) the Wisconsin inheritance tax is imposed upon transfers, and by Sec. 72.04:

> "All property transferred * * * to corporations of this state * * * for religious, humane, charitable, or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state * * * shall be exempt."

Conditional transfers in trust are also recognized as exempt transfers by Sec. 72.15 (8), which provides:

> "72.15(8) When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, divested, extended or abridged, a tax shall be imposed upon such transfer at the lowest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of Sections 72.01 to 72.24, inclusive, and such tax so imposed shall be due and payable forthwith out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is transferred to a person or corporation, which under the provisions of Sections 72.01 to 72.24, inclusive, is required to pay a tax of a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, * * *."

Wisconsin inheritance taxes are computed as of the date of the death and this statute in effect relates all contingent transfers back to the date of death however long delayed.

E. *Certiorari should be Granted because the Issues Raised are of Great Importance and the Decisions in the Several Circuits are at Variance.*

The issue is of national importancce because discretionary trusts are common throughout the country, and this court has not yet passed upon the merits of a case involving this question. As a result, the circuit courts of appeal are attempting to apply the decisions of this court not involving precedent conditional acts of discretion to situations involving transfers dependent on such acts, and reaching results not in accord with the law and regulations, and are at variance with each other.

In *Humes vs. U. S.*, 276 U. S. 487, 48 S. C. 347, the testator created a trust giving his niece a life estate with remainder to charity in the event she should die without issue before attaining the age of 40. The remainder to charity being vested was subject to be divested by said condition subsequent. The niece was then 15 years of age. The court said:

> "It is clear that Congress did not intend that deduction should be made for a contingent gift of that character."

The court quotes Art. 56, Reg. 37, and the result, in effect, applied the proviso of the first sentence of the Article, that the event "shall have taken place before the deduction can be allowed." Being a condition subsequent, it also gave effect to the second sentence providing that where the gift "is subject to be defeated by a subsequent act or event, no deduction will be allowed."

This question again arose in *U. S. vs. Provident Trust Co.*, 291 U. S. 272, where testator created a trust to pay income to his daughter for life, and upon her death to her lawful issue, and upon her death, without issue, to charities within the meaning of Sec. 403(a) of the Revenue Act of 1918. In this case the life tenant was 50 years of age, and the evidence was such that the possibility of issue was negligible, although as stated in *City Bank Farmers' Trust*

Co. vs. U. S., 2 Cir., 74 F (2) 692, 694, there was some evidence giving a slight basis for such possibility. However, it was such that if the interest had been offered for sale on the open market the possibility "would have been ignored by every intelligent bidder as utterly destitute of reason." Since the operation which prevented the possibility of issue occurred before testator's death, the case does not directly bear upon the issue now presented to the court. The case is principally of interest here because of the assumption by the court, "that Congress could not have meant to leave its aim to be diverted by a purely arbitrary presumption, which, whether applicable or not, to *sustain* another or different policy, would deny the truth and *subvert* the policy of this particular legislation."

Here, we are urging upon the court the well established presumption or doctrine of relation back to *sustain* and not to *subvert* the policy of Congress.

In *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151, 155; 49 S. C. 291, testator gave his wife a life estate with remainder to admitted charities, subject to the authority of the wife to use principal necessary to maintain her in comfort. The Court held that the will set up a standard which could be stated in definite terms of money, and that the income was more than sufficient for the widow's support, measured by these standards. The Court makes a statement which we believe has lead the circuit courts astray. The courts have applied language intended by this Court to apply only to a power to defeat or divert on condition subsequent as if the language applied to a power to appoint or benefit on condition precedent. The language, proper in its place as used by this Court, which has caused misunderstanding is the sentence "It was not left to the widow's discretion." A proper application of this language

was made by the 7th Circuit in *Knoernschild vs. Commissioner*, 7 Cir., 97 F. (2) 213.

Since the invasion of principal was in effect, under the facts of the *Ithaca Trust Co.* case, regardless of the terms of the will, not within the widow's discretion, the language has no application to the case now presented to the court. It is of interest, however, as supporting the regulation, in that before the deduction could be allowed it was clear that the transfer was not dependent upon the power of the widow to invade principal. In other words, this condition had effectually been eliminated before the return was required to be filed and the tax assessed. The question now presented to the court would have been more nearly raised in that case if the income had not been sufficient for the widow's comfort, and before the estate tax return was filed she had made an irrevocable disclaimer of the right to invade principal.

The second question treated by this Court in *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151, 155; 49 S. C. 291, is of equal interest, in that the Court says:

> "The estate, so far as may be, is settled as of the day of the testator's death."

This is the language of relation back for which we contend, but which doctrine so many Circuit Courts recently have not followed.

If the doctrine makes the act of personal representatives or the tribunal named by the decedent the act of the decedent, then the transfer is imperative or mandatory and not precatory or merely left to discretion. The examples of events which occur during the period of administration of an estate or trust bearing upon the computation of the estate tax, and relating back to the date of death as of which the tax is computed, are numerous.

Valuation, construction of will, appointment of executors, and execution of powers all relate back to the date of death and speak as of that date. There is no basis for discriminating against, or distinguishing, discretionary powers from other powers in this respect.

The Court did not make the death of Mrs. Stewart relate back to the testator's death, but the event of her death was an event entailing quite different legal consequences than would have been the event of her disclaimer of any right to invade principal had their been any such possibility. Death is not an expression of the will of the decedent.

There is a practical necessity for the rule that the value of a life estate be taken as of the date of death, and be based on experience tables rather than the experience of the individual life tenant. Mrs. Stewart died within six months of the testator and before the deduction to charity could be allowed. Yet, as the court below says, (p. 799), the Commissioner seeks certainty. The law also seeks certainty. Tax computations speak as of the date of death and most life tenants survive the computation of the tax when the deduction to charity can be allowed. Therefore, the certain and uniform treatment of estates for estate tax purposes requires that valuation be based on experience tables. (T. 182)

This practical necessity does not apply to events intended or contemplated by the testator, and done to carry out his will. The uncertainty of death is to be distinguished from the uncertainty of discretionary events which can be advanced or retarded by human volition. The difference in fact requires difference in treatment. This was recognized by the Commissioner and is reflected in his regulation permitting the deduction to be effected by events

occurring before the deduction can be allowed. (Art. 47, Reg. 80) Such difference is reflected in court decisions in which voluntary acts, including disclaimers and discretionary powers, relate back to the date of death.

Helvering vs. Safe Deposit & Trust Co., 316 U. S. 56, 65; 62 S. C. 925, 930.

Helvering vs. Grinnell, 294 U. S. 153; 55 S. C. 354; 79 L. Ed. 825.

Brown vs. Routzahn, 6 Cir., 63 F. (2) 914.

Brown vs. Commissioner, 3 Cir., 50 F. (2) 842, 846.

Davison vs. Commissioner, 2 Cir., 81 F. (2d) 16, 18.

St. Louis Union Trust Co., vs. Burnet, 8 Cir., 59 F. (2) 922, 926, seq.

Commissioner vs. First National Bank, 5 Cir., 102 F. (2) 129, 131.

Dimock vs. Corwin, 2 Cir., 99 F (2) 799, 802.

Humphrey vs. Millard, 2 Cir., 79 F. (2) 107, 108.

The Court, in this last case, said that the widow's "statutory right to defeat partially the tax-exempt testamentary disposition * * * was in the nature of a power which could be renounced." The Commissioner contended that the waiver, being made after the testator's death, was of no moment for the reason that to be deductible it must be determined from what is known as the date of death. As to this the Court says:

> "But here no uncertainty existed at the time Mr. Crosby died which was inherent in the language of his will."

So, with the will of Mrs. Norris there is no uncertainty inherent therein. The powers of the trustees are clear and certain and they exercised them without question. The court also says (p. 108):

"While it cannot be said that there was no uncertainty as to the amount of the charitable bequests at the time the testator died, * * * that related only to the validity of the will as an instrument for the transfer of one-half of the residuary estate. When the will was proved and allowed in the Surrogate's Court, it was for the first time judicially determined to be the effective will of the testator in all respects as written. This was not only a decision binding upon the defendants that the will was valid, but that it disposed of the residuary estate as of the date of the death of the testator in a manner exempt from federal estate taxation * * *. It may be said that more or less uncertainty exists as to the validity of any will until it is proved and allowed. But, when it is finally allowed by a court having jurisdiction, all such uncertainty, whatever may have been its degree, is dispelled for all purposes and that as of the instant of the death of the testator. So the uncertanty relied on by the defendants is not the kind which is material to the issue here.

Such difference is also reflected finally in the Act of Congress (Revenue Act of 1942, Sec. 408(c)), which we say is declaratory of the law and amended the estate tax act to reconcile it with court decisions, some of which are cited above. It was not a change in the law, intended to deal only with the future, as the court below holds. (R. 188, 9) (p. 803) If the Commissioner had intended the regulations to provide that conditions not performed at death should prevent deduction, he could have used the words "occur at or before death" instead of the words actually used by him, "It is necessary that the performance of the act, or the occurrence of the event shall have taken place before the deduction can be allowed." It is these words which have been incorporated into the law by subsequent acts of Congress.

Helvering vs. R. J. Reynolds Tobacco Company, 306 U. S. 110, 59 S. C. 423, 425-7.

Rules of statutory construction require that the integration supplied by Congress and the Commissioner shall be followed according to the natural meaning of the words. There is no room to construe the words "before the deduction can be allowed" as if they meant, as the Commissioner now contends they do, "at or prior to death before the deduction can be allowed." These words can not be supplied in the regulations by judicial construction when they are contrary to the clear and unambiguous language of the regulations. The interpolation of these words is contrary to reason since thereby a large class of contingent transfers to charity would be eliminated and the purpose of Congress defeated.

The court below (p. 800) by the quotation from *Gammons vs. Hassett*, 1 Cir., 121 F. (2) 229, 231, that there must be certainty "at the date of the testator's death," judicially interpolates into the regulation these words not approved by Congress, thus defeating and subverting congressional policy.

The decision below (134 F (2) 796) (T. 176-189) is at variance with decisions of other circuits.

In *Brown vs. Commissioner*, 3 Cir., 50 F. (2) 842, the Court allowed the deduction for transfers to charity on facts similar to those before the court. Brown made a trust deed and died within a year. The property included in the trust was held to be part of his estate. The deed gave the trustees discretion to distribute the principal "bearing in mind the ideals" of the settlor. They exercised their discretion after his death. The Commissioner contended the language of the trust gave the trustees power to use the fund for purposes not charitable. The Court held the will, while indefinite, provided a sufficient standard, and the act of the trustees related back and spoke

as of the settlor's death. The present will at item 18(T) creates a standard "to pay to any worthy charitable, religious, or educational corporation, association or enterprise, operating in the city of Milwaukee * * * with the suggestion which is not mandatory, that the enterprises which I have been interested in be given the preference." Since the suggestion is not "mandatory," the language implies that some exercise of discretion is mandatory. The Court below, unlike the third circuit, has declined to have the discretionary act of petitioners relate back and the two circuits are at variance.

In *Levey vs. Smith*, 7 Cir., 103 F. (2) 643, 7, 8, the Court below said it was "not persuaded of the soundness of the reasoning or the correctness of the result reached" in *Brown vs. Commissioner*, 3 Cir., 50 F. (2) 842, but conceded (p. 647) that "under the court's construction of the language of the trust it follows that the settlor of the trust required the trustees to devote funds for a particular purpose, * * * which purpose was a charitable one." The 7th Circuit, however, held (p. 648) that *Levey's* will did not "create a charitable trust which would impose upon Adoniram Lodge the legal duty to treat the legacy as a gift exclusively for * * * charitable purposes." In the decision below (p. 800) the divided court does not this time repeat that "it is not persuaded of the soundness" of the decision in the Third Circuit "in point for petitioners."

In *Davison vs. Commissioner*, 2 Cir., 81 F. (2) 16, 18, the court says:

> "It may well be that a renunciation of a power of appointment would, for some purposes, relate back to the death of the original testator."

The court, however, while thus, in effect, indicating that the law would permit or require the deduction if the power had been renounced before the deduction could be allowed,

nevertheless, because the renunciation did not take place until six years after decedent's death held that the practical certainty required in order to justify the deductions of bequests to charity was not satisfied. The Second Circuit thus indicates that a timely renunciation would have been effective, and so is at variance with the court below.

In *Brown vs. Routzahn,* 6 Cir., 63 F. (2) 914, the Sixth Circuit adopted the principle of relation back and held that a donee who rejected a testamentary gift did not receive the taxable transfer. The Court, we believe, necessarily adopted the doctrine of relation back which the court below rejected.

In *Potter vs. Bowers,* 2 Cir., 89 F. (2) 687, the Court held that the creation of a charitable corporation not in existence when testator died, and no steps taken in its creation until over two years after decedent's death, nevertheless qualified, and, in effect, that the creation of the corporation related back so that income received in the meantime was tax exempt.

In *Mead vs. Welch,* 9 Cir., 95 F. (2) 617, the Commissioner contended that the bequest was uncertain, and its value could not be estimated on the basis of any known data as of the date of death. The Court held that since the record did not show that the heirs did not disclaim under the mortmain statute, the question not raised in the trial court could not be raised on appeal and that the deduction of the entire bequest to charity would not be disturbed.

In *Dimock vs. Corwin,* 2 Cir., 99 F. (2) 799, 800, Mr. Folger bequeathed legacies to his relatives, with remainder for the Folger Shakespeare Memorial Library. After the death of Mr. Folger those who, under the intestate laws of New York, might have shared in his estate executed

written waivers of any objection to his will. The waivers were dated ten days after his death. The Court held that these waivers made after death related back to decedent, and not to the heirs who gave them. The right to withhold them did not constitute a power in the heirs to divert the estate from charity. In this respect the decision is at variance with the decision below.

In *Commissioner vs. First National Bank,* 5 Cir., 102 F. (2) 129, the Georgia code declared void any devise made less than 90 days before testator's death. The charitable bequests in question were made within such period. The heirs renounced their right to contest the bequests. The Court held in effect that the renunciation related back and that the bequest spoke from the will, and that the deduction to charity should be allowed. To this extent the 5th Circuit is at variance with the 7th Circuit below.

In *St. Louis Union Trust Co. vs. Burnet,* 8 Cir., 59 F. (2) 922, 926, there were two charitable transfers involved. As to the first, under Item 6a the gift to the Union Methodist Episcopal Church was dependent upon its continuing as a downtown church in St. Louis, and upon the further condition that the church secure from its membership annual support in an amount equal to at least double the amount of the income from the gift, and other conditions, with the proviso that if after ten years the church failed to meet the conditions, the gift failed. The Court quotes (p. 924, 925) Art. 50, Reg. 63 (1922 Edition), relating to conditional bequests to the effect that the condition must have taken place "before the deduction can be allowed," and says (p. 925, 926):

> At the time of the testator's death, it was impossible definitely to determine whether for the extended period named the church would devote the net income from the stock to the precise uses prescribed, or that

> it would or could secure from its membership annually "an amount equal to at least double the amount of said net income from said preferred stock." Apparently, for a period of six years, no attempt was made to reach such a determination, and then the conditions were sought to be satisfied, not by performance, but by guaranty only.

We conclude, therefore, that if the conditions had been satisfied before the deduction could be allowed the Court would have held the charitable bequest deductible, and if this is correct the Eighth Circuit is then at variance with the Seventh Circuit below. This variance is further indicated by the treatment by the court of the 13th article of the will of George Warren Brown, in said case, which provided that the residue of his estate should go to trustees for five years, and then be devoted to such benevolent purposes as would constitute a fitting testimonial or memorial for the testator, and in some degree extend his usefulness and helpfulness to others. The Commissioner contended that the word "benevolent" was broader than the language of the statutory deduction, i.e., than the word "charitable". Referring (p. 927) to the rule that taxation is intensely practical and that doubts are to be resolved against the government, the Court noted, (p. 929) that the trustees had "authority to select the beneficiaries" and said:

> This would necessarily exclude the conception of a private benefaction beyond the scope of a public charity. The trustees have transferred this fund to the Young Men's Christian Association and to Washington University, both of the city of St. Louis, Mo. * * * We do not contend that what the trustees have actually done is determinative of the petitioner's right to deduction."

It is conceivable that a proper memorial, within the terms of the will, might have been a bronze statue in some public square, and it is doubtful whether such a disposition of the fund would have constituted a charitable transfer.

We contend, therefore, that this case is at variance with the decision below in that the exercise of discretion by the trustees, is a recognition of the doctrine of relation back and of the principle that the act of the trustees is the act of the testator. Whether the discretionary acts of the trustees transferring the fund to the Young Men's Christian Association and Washington University were timely, under the regulations, is not clear to us, and under the construction adopted by the court that the word "benevolent" was equivalent to "charitable" the question of timeliness was in effect eliminated.

In *Mississippi Valley Trust Co. vs. Commissioner,* 8 Cir., 72 F. (2) 197, 199, the court apparently recognized that if the power in that case had been "coupled with a mandatory duty to exercise it," the deduction might have been allowable. It was held not allowable because (p. 200) "lacking in mandatory character," the testator having said "I, therefore, make no such bequests herein." The entire matter was left to his heirs on a precatory basis. We conclude, therefore, that if there had been a real trust in that case, such as Mrs. Norris created, and the trustees had acted within their powers, as here, the transfer to Washington University would have been allowed as deductible. From this we conclude that this case from the Eighth Circuit is at variance with the decision below.

In *Meierhof vs. Higgins,* 2 Cir., 129 F. (2) 1002, testator gave the income of a fund to his sister for life, and if upon her death her husband should be living, one-half the trust fund was to be held for her sister's husband for life. The remainder in either case, and the other one-half in the latter case, was to be paid to testatrix's widow, if living, and if not, to Columbia University. The sister was 74 years of age, her husband 79, and decedent's widow 71 at the time of decedent's death. The Court held that the

valuation of the remainder to Columbia University was presently ascertainable and that Art. 47 must be read in connection with Art. 44, which provides that the deduction may be taken only in so far as the value of the beneficial interest to charity is presently ascertainable, and said (p. 1006):

> "The right to deduct the value in a case like the present depends not on whether it is contingent or vested, but on whether it has an ascertainable market value, * * *."

In recognizing that bequests still contingent after death may be deducted where the value is ascertainable, the decision is at variance with the decision below which appears to hold that a transfer dependent upon a contingency, which has not occurred at or prior to death, is not deductible. The Court below recognized that the values were presently ascertainable, saying (p. 801) that the objection of uncertainty or speculative value is not "here present." The Commissioner has stipulated to a definite value for the deduction to the hospital of $5,000.00 and to Norris Foundation of $284,341.10 (T. 13, 14).

The Court below, (p. 797) quotes Art. 44, Reg. 80 in part, but omits the second paragraph quoted by the Eighth Circuit, above, the first sentence of which provides:

> "If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is *presently* ascertainable, and hence severable from the interest in favor of the private use." (emphasis ours)

The word "presently" does not indicate a moment of time, but rather that reasonable time fixed by the Commissioner and which relates back to the date of death.

Corscott vs. State, 178 Wis. 661, 670.

33 *Words and Phrases*, 464, "Present Time."

In *Beggs vs. U. S.*, Court of Claims, 27 F. Supp. 599, the testator provided that the proceeds from the sale of his estate should, by the executor with the advice of testator's sister, "be divided and distributed and given to such charities and worthy objects" as they should determine. The testator further said:

> "It is my intention to write to my said sister, indicating to her my special friends, charities and worthy objects, I may wish my executor with her advice to provide for, * * *."

The Commissioner argued that the reference to friends and worthy objects permitted the executor to exercise his discretion in favor of objects not charitable within the meaning of the estate tax deduction. Nevertheless, they did distribute it all to tax exempt charitable institutions as was stipulated (p. 606). The Court held that the distribution was made pursuant to the terms of the will, and not as a result of absolute discretion; that the tax exemption should not be narrowly construed, and that the deduction should be allowed. This case is, in effect, at variance with the decision below.

It remains to discuss a few cases which, in principle or result, seem to support the decision below.

In *U. S. vs. Fourth National Bank in Wichita, Kan.*, 10 Cir., 83 F. (2) 85, the testator made a gift to the First Presbyterian Church upon condition that the church should contribute an equal amount, and that work on the commencement of the new church should be started, all within 15 months from the date of the gift, and if the conditions should not have been performed the gift should fail. After the death of the testator there was litigation in the Kansas courts, first concerning the power of the donor to make the gift in view of a joint will with his wife. The Supreme

Court of Kansas held the gift valid. Later a contest arose as to whether the time for the church to comply with the condition of the gift had expired, and the Supreme Court of Kansas held that the time limit was suspended by the litigation. Within two months after the trial of the tax case, under consideration by the court, the building of the church was commenced, and thereafter was completed within a reasonable time. The court (p. 89) quotes Art. 47, Reg. 68. After citing *Ithaca Trust Co. vs. U. S.*, 279 U. S. 151; 49 S. C. 291; 73 L. Ed. 647, and other cases, the court says (p. 90):

> "The determination of a deduction under the statute depends upon the facts and circumstances in each individual case where a condition is attached, and where the gift or bequest is based upon such condition, if the value of that contingent interest can be ascertained by reasonable methods or by recognized data *as of* the date of the death of a testator, the amount for deduction should be so determined and the deduction allowed. * * * (Emphasis ours)
>
> "If the gift is based upon a condition precedent, there being nothing in the record tending to show that the condition had been complied with at the date of the death of the testator, the fund would then remain as a part of his estate and as a consequence the deduction manifestly should not be allowed. * * *
>
> (p. 92) "The gift being based upon a condition precedent the requirements of which had not been complied with at the time of the death of the donor, it cannot be said that at that time the fund was not a part of his estate. This view would likewise seem to be in complete harmony with the applicable Treasury Regulations."

The words "as of" in one paragraph and the word "at" in the next, referring to date of death is inconsistent.

These excerpts tend to show that the Court interprets Art. 47, Reg. 68 in a strict manner, overlooking the doc-

trine of relation back, and the liberal purpose of Congress. It interprets the regulation to mean that the deduction is one allowable at death and, therefore, the act must have been performed or the event have occurred before death. This interpretation appears to have been based upon the language in *Ithaca Trust Co. vs. U. S., supra,* since the court says, (p. 89) of that case:

> "It was held that the value of the bequest to charities at the time of the death of the testator could be reasonably ascertained * * *."

and (p. 90):

> "Here we are confronted with the task of fixing value on a contingency in connection with a church congregation raising a fund approximating $100,000.00 within a given time, which broadly would seem more speculative and uncertain than any of the examples set forth in the reviewed cases, except perhaps the St. Louis Trust Company Case, supra, in which the facts were somewhat analogous and the deduction denied."

We have shown, however, that in the case last referred to by the Court no attempt was made to meet the condition for a period of six years, and as to the second transfer there involved, the court permitted the deduction over the objection of the Commissioner.

The result in the Kansas case may be justified upon the ground suggested, but not expressly stated, by the Court that the litigation involved in two law suits, both going to the court of last resort in Kansas, had so delayed the making of the transfer that it did not occur before the deduction could be allowed within the meaning of the regulations. Since the building was not commenced until two months after the tax case was tried, it clearly appears this event had not occurred before the deduction could be allowed.

In *Burdick vs. Commissioner,* 2 Cir., 117 F. (2) 972, the deduction claimed was for a transfer of $400,000.00 to Lalor Foundation, Inc., a charitable corporation within the statute. The will, probated March 20, 1935, gave $100,000.00 to such educational institution as testator's sister might select, and another $300,000.00 to such institution as might be selected by his nephew. The will stated that he had discussed his wishes with them. They were given the power to be exercised within one year after probate of the will to change educational institutions already selected. On October 14, 1935, Lalor Foundation, Inc., was designated and the bequest paid to it. The Court points out that the deduction is applicable to testamentary dispositions only; that the purpose is to encourage testators to make charitable gifts; and the gifts so made are to be valued as of the date of death for the purpose of determining the amount of the deduction, citing *Ithaca Trust Co., vs. U. S., supra.*

The Court says (p. 974):

> "When the bequest, though charitable, is at the time of death contingent and uncertain ever to take effect no deduction may be allowed."

The Court necessarily makes this concession, however, (p. 974):

> "But there are varying degrees of uncertainty and if the gift is in terms effective *as of* the time the testator died and only an improbable diminution in funds available to pay it creates the contingency it is not too uncertain to be treated as absolute for purposes of deduction." (Emphasis ours)
>
> *Ithaca Trust Co. vs. U. S., supra.*

The court thus used the language of relation back, but did not apply the principle. The court says, referring to the fact that if the tribunal set up by the decedent failed to act, the gifts should fall into the residue, (p. 974):

"The situation comes within the second paragraph of T. R. 80; Art. 47 providing that if the gift may be diverted in whole or in part by the exercise of a power by the legatee, devisee, donee or trustee to a use or purpose which would have made it not deductible had the testator so provided directly in his will the 'deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power'."

In other words, the Court here applies the portion of the regulation relating to conditions subsequent to a transfer dependent upon a condition precedent, and entirely overlooks the portion of the Commissioner's regulation relating to conditions precedent permitting the deduction where the event occurs before the deduction can be allowed, as it did occur in this case of *Lalor's* will. The second paragraph of the regulation, upon which the Court relies, recognizes the principle of relation back to the extent that if the trustees may only divert the trust property to another charity equally exempt, such transfer is effective as fully and to the same extent as if "provided directly in his will."

The distinction between this case and the case below is that there was no trust set up with trustees who might have been compelled to exercise their discretion, as under Wisconsin law the petitioners have an imperative duty to do. *Lalor's* gifts were directly to the institutions to be selected, and possibly the court is right in saying "There was nothing mandatory about it in the will and no one had the legal right to require them to make any designation at all." We believe, however, the case was wrongly decided under the proviso of the regulations and the practical application of the purpose of Congress, since clearly the selection having been made, the transfer was the result of a testamentary provision.

In *First Trust Co. of St. Paul vs. Reynolds,* 46 F. Supp. 497, the will of Frank B. Kellogg, former Secretary of State, was involved. He made gifts to the Protestant Episcopal Cathedral Foundation of the District of Columbia and to the University of Minnesota, subject to the condition that his widow first give her express consent in writing to the making of the transfers. Testator died December 21, 1937, and on September 12, 1938, his widow filed in probate court a written instrument giving her express consent to the payment of the bequests, and they were paid within a few months thereafter. The Court quotes Art. 47, Reg. 80, and *Burdick vs. Commissioner, supra,* wherein it was said (p. 974), referring to the regulation: "It stands as the law which controls the present situation."

The Court says, (p. 499):

> "The statute applicable here is clear. It provides that bequests to corporations organized and operated exclusively for charitable, religious or educational purposes may be deducted from the gross estate. The effective regulation is equally clear. It provides that if a devisee is empowered to divert the property to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so devised, deduction will be limited to that portion, if any, of the property which is exempt from an exercise of such power. * * * The purpose of the regulation is to prevent the deduction of bequests that are conditional or contingent and that ultimately may not be paid. The regulation, in its interpretation of the statutory enactment, is designed to prevent deductions being made on bequests that are conditional and contingent and may be defeated by some subsequent act or event. An objective of the law and the regulations is to prevent the deduction of bequests that are subject to defeasance provisions."

Thus the Court applies the regulation only in part and entirely disregards that portion of the regulation which clearly says that if the event has occurred, then the deduction can be allowed. The court says that the regulation stands as the law, and says (p. 500):

> The general rule requiring adherence to the letter of a statute applies with strictness to taxing acts. *Crooks vs. Harrelson*, 282 U. S. 55; 51 S. C. 49; 75 L. Ed. 156. In case of doubt, taxing statutes are construed in favor of the taxpayer. *Gould vs. Gould*, 245 U. S. 151; 38 S. C. 53; 62 L. Ed. 211."

The Court failed to follow the letter of the statute as reflected in the regulation, and failed to give the natural construction of the regulation which is the one favorable to the taxpayer. The Court also says, (p. 500):

> "There should be no deviation from the plain language of the statute to escape an undesirable result or a hard case."

In view of the "absolute priority" (134 F. (2) 796, 801) (T. 184) of the Congressional intent to prefer charitable gifts to estate taxes the Court should not have deviated from the language of the regulation, and should not have considered the granting of the deduction and the diminution of estate taxes as "an undesirable result." The court quotes *Gammons vs. Hassett*, 1 Cir., 121 F. (2) 235, but does not note that the quotation is from the concurring opinion.

This latter decision influenced the Court below (p. 800), (T. 183) which quoted with approval in the result, language to the effect that a deduction for charity will be allowed "only if the value of the charitable gift can be ascertained definitely at the date of the testator's death."

In *Gammons vs. Hassett*, 1 Cir., 121 F. (2) 229, the decedent, age 92, left a widow, age 93, and by his will provided for a gift to the New England Grenfell Associ-

ation, and the Society for Prevention of Cruelty to Animals, admitted charitable corporations, subject to invasion of the principal by such amounts "as my said wife may at any time, and from time to time, need or desire, to be paid to my said wife during her life." Decedent and his wife had no children. He had no near relatives. She had been bedridden for more than two years before her husband's death, and after his death it was necessary to appoint a conservator for her because of her physical condition. The deduction was denied because the word "desire" was construed to give the widow power entirely to defeat the charitable bequests. On this point the court cites *Knoernschild vs. Commissioner*, 7 Cir., 97 F. (2) 213, a stronger case to the same effect. In the concurring opinion Judge Magruder points out the practical certainty that the transfers to charity would take effect, and intimates that only theoretically is the contingency broader than in the *Ithaca Trust Co.* case. Judge Magruder says:

> "The Ithaca Trust case must be considered as going to the very verge of the law, and in the absence of further guidance from the Supreme Court we ought not to extend the doctrine of that case however logical and appealing the extension might be under the particular facts."

This hackneyed and rather euphemistic expression, "very verge of the law," is possibly true where the facts are analogous. But this statement is not true to the extent that the principles underlying the *Ithaca Trust Co.* case may not be applied to other facts as here.

Petitioners are not asking the Supreme Court to extend the doctrine of the *Ithaca Trust Company* case. The facts of the present case are different from the facts in that case but the principles of that case should be given authoritative application to the present facts. What we are asking

the court to do is to give further guidance with respect to the application of the regulations having the force of law relating to contingent bequests, which the Court below did not apply in accordance with the terms thereof. Such guidance is necessary in order that the Commissioner be required to follow his regulations as approved by subsequent acts of Congress, and the recent interpretation by the amendment of 1942. A situation clearly within the regulation, would have been provided in *Gammons vs. Hassett, supra,* if the widow, with the consent of her conservator, had filed a disclaimer of her right to withdraw any portion of the funds transferred to the two charities in question. At any rate the case, being one of condition subsequent, does not control the present case which depends upon conditions precedent, to-wit, the exercise of the discretionary powers of the petitioners as executors and trustees.

(T. 181)

(T. 188)

In *Watkins vs. Fly,* 5 Cir., June 4, 1943, Opinion on Rehearing, July 7, 1943, (reported at Prentice-Hall Estate Tax Service, paragraphs 62,677 and 62,738) the Court was influenced by the form rather than the substance of the transaction, and the result is at variance with cases involving similar facts, such as:

Commissioner vs. First National Bank of Atlanta, 5 Cir., 102 F. (2) 129.

Humphrey vs. Millard, 2 Cir., 79 F. (2) 107.

Dimock vs. Corwin, 2 Cir., 99 F. (2) 799, affirmed (on other grounds) 306 U. S. 363, 59 S. C. 551.

Mead vs. Welch, 9 Cir., 95 F. (2) 617.

The foregoing collection of cases indicates the confusion and variety of result which obtains in the various circuits in cases involving conditional or defeasible gifts to charity. It is important that the court take jurisdiction of this case in order that the law may be made more definite and certain, that the courts may be guided by correct principles in the future and that justice may be done in this case.

CONCLUSION

WHEREFORE, petitioners pray that a writ of certiorari issue in this case; that the court consider on the merits the refusal of the Commissioner to allow the deductions in question; and that the action of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

PERRY J. STEARNS,
Attorney for Petitioners.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 238

DANIEL W. NORRIS, EMMET L. RICHARDSON, AND PERRY J. STEARNS, AS EXECUTORS OF THE WILL OF FANNIE W. NORRIS, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 154–165) is reported in 46 B. T. A. 705. The opinion of the Circuit Court of Appeals (R. 176–189) is reported in 134 F. 2d 796.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 8, 1943 (R. 189). The petition

for rehearing, filed April 23, 1943, was denied May 10, 1943 (R. 190). The petition for a writ of certiorari was filed August 6, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

By the terms of the decedent's will, the trustees were empowered in their discretion and option to pay out a part of the residuary estate to charitable organizations or to apply this part of the estate to noncharitable purposes. Pursuant to this power, the trustees made certain payments to charitable organizations. Were such payments deductible under Section 303 (a) (3) of the Revenue Act of 1926, as amended?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 15–17.

STATEMENT

The Board of Tax Appeals found the following facts (R. 155–160):

The decedent died testate on April 26, 1937 (R. 155).

The will of decedent provided *inter alia,* as follows (R. 155–159):

> *Item Eighteen.*—All the rest, residue and remainder of my estate, real, personal and

mixed, of whatsoever the same may consist, and wherever the same may be, I give, devise and bequeath unto my trustees hereinafter named, the surviver of them and their successors, in trust, to have and to hold the same during the continuance of the lives of—

my son, Daniel Wells Norris,
Francis D. Weeks,
Mabel F. LaCroix,
Helen Bradley and
Elizabeth Durham,

all of whom are named and identified in this will, and the survivors and survivors of them, and thirty (30) years after the death of such survivor.

I direct that my said trustees shall have entire control and management of the trust property committed to their care, invest and re-invest the same, change investments and sell, pledge and dispose of all such trust property as they, from time to time shall deem best, and collect all moneys, principal and income, that may be owing, and dispose of said principal and income as herein directed.

After deducting all taxes and expenses in the management of the trust funds, services of agents, attorneys and reasonable compensations to the trustees from the gross income of the trust property, I direct the trustees to use the net annual income thereof as follows, to-wit:

> I direct my said trustees to use annually for the comfort, welfare and happiness of each of the following named persons during the periods described, the annual sums designated in each case. I direct that my said Trustees and their successors shall have the power, from time to time, in their uncontrolled discretion, to reapportion such income among such beneficiaries as they deem best, increasing the amounts paid to some beneficiaries and decreasing the amounts paid to others to the extent of entirely excluding any beneficiary from the receipt of income for such time as said Trustees deem best, and the decision of my said Trustees adding to or subtracting from the amounts designated, shall be final and conclusive.

[Subparagraphs lettered "(A)" to "(Q)", both inclusive, in which decedent named various annuitants, are omitted.][1]

> (R) If and when said Trustees are satisfied that they shall have in their possession trust property more than sufficient to meet in full all the previous requirements of my will, then I direct said trustees to pay out of the principal of the trust property in their possession to Columbia Hospital of Milwaukee, Wisconsin, meaning the corporation by that name conducting a hospital near Milwaukee-Downer College, a sum not

[1] The text of these subparagraphs was omitted from the findings of the Board of Tax Appeals and the note within the brackets substituted (R. 156; 46 B. T. A. 705, 706).

exceeding Five Thousand (5,000) Dollars.

(S) After my trustees have paid to Columbia Hospital the sum of not exceeding Five Thousand (5,000) Dollars as set forth in Subdivision (R) of this Item, I authorize and empower them, whenever and as often as they are satisfied that they have in their hands ample funds to fulfill all the previous requirements of my said will, to appropriate and pay over such sums of money as they, in their discretion, may deem best, as additional bequests to such of the beneficiaries named in Items Fourteen, Fifteen and Eighteen, as they may from time to time determine.

(T) After my trustees have paid to Columbia Hospital the sum of not exceeding Five Thousand (5,000) Dollars as set forth above, I authorize and empower them whenever and as often as they are satisfied that they have in their hands ample funds to fulfill all the requirements of my said will, at their discretion and option, to pay to any worthy charitable, religious or educational corporation, association or enterprise, operating in the city of Milwaukee, Wisconsin, such sums of money out of the principal in their hands as they may deem best, with the suggestion which is not mandatory, that the enterprises which I have been interested in be given the preference.

(U) The trustees shall have absolute discretion as to the best manner of expending and using the several sums of money I have

hereinbefore authorized them to use for the comfort, support, welfare, and happiness of the several beneficiaries above named; and said trustees may, if they deem it best, pay directly to any one or more of said beneficiaries parts or all of said sums, provided however that none of said beneficiaries shall be entitled, as a matter of right, to receive his or her portion in cash, and shall have no right to assign or sell the same; and said trustees shall never be under any obligation to honor any such assignment or sale.

(V) The trustees may, if they deem it best, use enough of the principal of the trust property in their possession, in purchasing an annuity or annuities in any one or more first class life insurance companies doing business in the United States of America, for the benefit of any or more of the beneficiaries named in this Item Eighteen, whereby each such beneficiary for whom any annuity shall be purchased shall receive during the continuance of his or her life an annual sum equal to that which I have herein directed said trustees to use for his or her comfort, support, welfare and happiness. After the commencement of the payment to any such beneficiaries of such annuity, said trustees shall cease all further expenditures for the benefit of such beneficiary.

(W) If the net annual income of the trust property in the hands of my trustees shall in any year exceed the amount required to

be paid out for the comfort, support, welfare and happiness of the several annuitants named in this will, then I direct said trustees to pay the excess to my son, Daniel Wells Norris, or in their discretion, use such excess for the comfort, support, welfare and happiness of such of said annuitants as the trustees shall think most in need thereof.

If the net annual income shall in any year be insufficient to meet the requirements set forth in the said will, then I authorize said trustees to use so much of the principal of said trust property as they shall deem wise and best in order to provide for the comfort, support, welfare and happiness of such annuitants.

(X) Notwithstanding the fact that the annuities herein created are in terms expressed as continuing during the lives of the several annuitants respectively, it is my intention that they shall cease upon the expiration of the term of the trust as hereinbefore limited and I so direct. If any of the annuitants named in this Item be living at the expiration of the trust herein created by lapse of time, I direct my said trustees to expend so much of the principal as may be necessary to purchase an annuity or annuities in any one or more reputable life insurance companies doing business in the United States of America so that the annuity then being paid to such annuitant may be continued during the balance of his or

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her life, and the remainder of such trust funds then in their hands shall be disposed of as provided in and by the next following Subdivision (Y) of this Item Eighteen.

(Y) In case there shall still be in the possession of said trustees any of said trust property, after said trustees shall have provided for the satisfaction in full of all the foregoing provisions of this Item Eighteen, I direct said trustees to pay and transfer the same to my son Daniel Wells Norris, if he be then living; and if he be dead, then to his surviving issue, to take *per stirpes* and not *per capita;* and if there shall then be no such surviving issue, then to the heirs of Marcia Wells, my mother, to have and to hold unto the heirs of Marcia Wells, their heirs and assigns forever, which heirs I direct shall take *per stirpes* and not *per capita.*

On July 25, 1938, the decedent's trustees paid $5,000 from the principal of the trust property to the Columbia Hospital of Milwaukee, Wisconsin, a corporation conducting a hospital, and also transferred to the Norris Foundation property which had a fair market value of $284,341.10 on the date of decedent's death (R. 159).

The Columbia Hospital of Milwaukee and the Norris Foundation are corporations organized and operated exclusively for religious and charitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual. No substantial part of the activi-

ties of either corporation is devoted to carrying on propaganda or otherwise attempting to influence legislation. (R. 159.)

Prior to making the above mentioned payment of $5,000 the trustees determined, and were satisfied, that they had in their possession trust property more than sufficient to meet in full all the requirements of decedent's will which preceded Item Eighteen (R) thereof. After such payment was made, the trustees determined, and were satisfied, that there were in their possession ample funds to fulfill all requirements of the decedent's will, and, in the exercise of the option and discretion referred to in Item Eighteen (T), the trustees transferred the above mentioned properties to the Norris Foundation after determining that the foundation was a worthy charitable, religious, or educational corporation, association or enterprise, operating in Milwaukee, and an enterprise in which the decedent had been interested in her lifetime. (R. 159–160.)

The federal estate tax return for decedent's estate was filed on July 26, 1938. Deductions from gross estate for charitable, public, and similar gifts and bequests were claimed in such return, *inter alia,* as follows: (2) Columbia Hospital, $5,000; (3) Norris Foundation, $262,511.12. The Commissioner disallowed these deductions. (R. 160.) The Board of Tax Appeals sustained the Commissioner (R. 164–165), and the court below affirmed (R. 189).

ARGUMENT

Section 303 (a) (3) of the Revenue Act of 1926, as amended (Appendix, *infra*) provides for the deduction of charitable bequests in computing the value of the net estate for purposes of the federal estate tax. Article 47 of Treasury Regulations 80 (1937 ed.) (Appendix, *infra,* pp. 16–17), covers conditional bequests and provides that if the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed; also, that if the donee or trustee is empowered to divert the property or fund to a noncharitable purpose the deduction will not be allowed.[2]

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[2] Similar provisions have been contained in regulations promulgated under earlier estate-tax laws. See Article 56, Regulations 37 (1921 ed.); Article 50, Regulations 63 (1922 ed.); Article 47, Regulations 68 (1924 ed.); Article 47, Regulations 70 (1926 and 1929 eds.). The regulations have received judicial approval. *Humes* v. *United States*, 276 U. S. 487, 491. They have also received legislative approval through the reenactment of statutory provisions relating to the deduction of charitable bequests which though not identical in the various Revenue Acts have not differed in any way that affects the regulation. *Taft* v. *Commissioner*, 304 U. S. 351; *Magruder* v. *Washington, B. & A. Realty Corp.*, 316 U. S. 69. Section 81.46 of Regulations 105, promulgated under the Internal Revenue Code, departs somewhat from the language used in the first paragraph of Article 47 of

In the instant case, the trustees were empowered in certain circumstances to pay out of principal "a sum not exceeding" (R. 156) $5,000 to the Columbia Hospital and thereafter "at their discretion and option" (R. 157) to use excess funds for charitable or noncharitable purposes. We submit that the Commissioner, the Board of Tax Appeals, and the court below all correctly ruled that there was not sufficient certainty at the time of the decedent's death that the payments would ever be made to charity to justify the claimed deductions. The payments in question were absolute and mandatory for no more than the one cent which had to be paid to Columbia Hospital under the terms of the will (R. 189).[3] Under the terms of the will (Item 18, subparagraph S, *supra*, p. 5) the trustees could have paid the excess amounts as additional bequests to such of the beneficiaries named in Items Fourteen, Fifteen,

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Regulations 80 (1937 ed.), but in our view makes no change as applied to the instant facts.

The Revenue Act of 1942, c. 619, 56 Stat. 798 (Sec. 408) amended the law, effective as to estates of decedents dying after February 10, 1939, with respect to deductions for disclaimed legacies passing to charity, but as pointed out by the court below (R. 188–189) this amendment would not affect the instant case.

[3] The taxpayers contend (Pet. 4, 31) that by Wisconsin law, which governs the interpretation of the will, the transfers were mandatory. The court below after carefully reviewing the authorities (R. 185–189) concluded otherwise and we submit that in the light of the language of the will, above noted, such conclusion is unquestionably correct. Cf. also *Helvering* v. *Stuart*, 317 U. S. 154, 162–163.

and Eighteen as they might determine (R. 26, 157, 162). Items Fourteen and Fifteen (R. 20–23) contain numerous specific bequests to relatives, friends, and others. Item Eighteen (R. 23–28) contains provisions with respect to disposition of the residuary estate and, among other things, provides for many annuities payable by the trustees to various persons; in addition, subparagraph V (R. 27, 157–158) authorizes the trustees to use principal to purchase annuities and subparagraph Y (R. 28, 159) provides for ultimate distribution of surplus property to the decedent's son, if living.

In similar situations the courts have quite uniformly denied the claimed deductions (*Burdick* v. *Commissioner,* 117 F. 2d 972 (C. C. A. 2d), certiorari denied, 314 U. S. 631; *Mississippi Valley Trust Co.* v. *Commissioner,* 72 F. 2d 197 (C. C. A. 8th), certiorari denied, 293 U. S. 604; *Robbins* v. *Commissioner,* 111 F. 2d 828 (C. C. A. 1st)).

In support of their application for a writ of certiorari the taxpayers assert (Pet. 2) a conflict with *Brown* v. *Commissioner,* 50 F. 2d 842 (C. C. A. 3d); *Meierhof* v. *Higgins,* 129 F. 2d 1002 (C. C. A. 2d); and *Smith* v. *Commissioner,* 78 F. 2d 897 (C. C. A. 1st). We submit that no such conflict exists. In the *Brown* case the trustees were directed to distribute the funds as they might deem best, bearing in mind the ideals of the settlor, expressed by him from time to time. The

evidence showed that the settlor had in mind the erection of a church and that the trustees had all been consulted and had taken part in conferences with the decedent and church officials prior to the decedent's death. The church was erected after his death and the amount expended for that purpose was allowed as a deduction. It is true that in the *Brown* case the court said (p. 846), relying on Pennsylvania law not applicable herein, that the designation of the church related back to the decedent's death and the church took the gift from the settlor and not from the trustees. Apparently this language was used with the thought in mind that the trustees were carrying out to the best of their ability the positive command of the decedent, and was not intended to cover a situation like the instant one where the trustees were given power to use the funds at their discretion and option for either charitable or noncharitable purposes. The *Meierhof* case is also materially distinguishable from the instant one. There it was held that where a bequest of a contingent remainder to charity can be shown to have a substantial value, determined by use of actuarial tables, a deduction on account thereof should be permitted. That conclusion was based upon *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, where the Court held that the gift in question was not too remote to be valued, and certainly neither the *Ithaca Trust Co.* case nor the *Meierhof* case is at vari-

ance with the conclusion that there can be no completed gift to charity where the trustees have it within their power to make another disposition of the fund. In the *Smith* case there was a compromise of a contest of the decedent's will as a result of which certain payments were made to charity. In holding that these payments were deductible, the court took the view that under local law the compromise provisions were to be given the same significance as though they had been actually included in the will. In the instant case there was no compromise and under state law, as construed by the court below (R. 185–189) the trustees could make payments to charity or others at their option. Moreover, the *Smith* case was subsequently specifically overruled by the same court which decided it, *Robbins* v. *Commissioner, supra,* p. 832.

CONCLUSION

The decision is correct; there is no conflict; the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
L. W. POST,
Special Assistants to the Attorney General.

SEPTEMBER 1943.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 303. [As amended by Sec. 807 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Secs. 403 and 406 of the Revenue Act of 1934, c. 277, 48 Stat. 680.] For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—

* * * * *

(3) The amount of all bequests, legacies, devises, or transfers, * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * * no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, * * * but only if such contributions or gifts are to be used by such trustee or trustees, * * * exclusively for religious, charitable, * * * or educational purposes, * * *. If the tax imposed by section 301, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the juris-

diction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. * * *

* * * * *

Treasury Regulations 80 (1937 ed.), promulgated under the Revenue Act of 1926, as amended:

ART. 44. *Transfers for public, charitable, religious, etc., uses.*—Deduction may be taken of the value of all property transferred by will * * * not to exceed the value of the transferred property required to be included in the gross estate if * * * the property was transferred * * * (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *; or (3) to a trustee or trustees, * * * if such transfers, legacies, bequests, or devises are to be used by such trustee, [or] trustees, * * * exclusively for religious, charitable, scientific, literary, or educational purposes, * * *.

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

* * * * *

ART. 47. *Conditional bequests.*—If the transfer is dependent upon the performance

of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

U. S. GOVERNMENT PRINTING OFFICE, 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 238

DANIEL W. NORRIS, EMMET L. RICHARDSON and PERRY J. STEARNS, as Executors of the Will of FANNIE W. NORRIS, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING AND BRIEF

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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for Seventh Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

Come now Daniel W. Norris, Emmet L. Richardson and Perry J. Stearns, as Executors of the Will of Fannie W. Norris, Deceased, petitioners in the above entitled cause, by their attorney, and present this their petition for a rehearing on the order of the Court denying their petition for a writ of certiorari, and in support thereof respectfully show:

1. The decisions of this Court with respect to the deduction of charitable bequests for estate tax purposes only reach two factual situations;

a. Where the charitable remainder is subject to be defeated by the birth of issue to a life tenant and a question arises as to possibility; (B. 40-1)

b. Where the testator gives the life tenant a power to invade corpus if required for necessary support. (B. 41-2)

2. There are other factual situations not yet covered by any guiding decision of this Court with respect to which two or more circuits are at odds, such as:

a. Where the life tenant renounces shortly after decedent's death the power given by will or law to defeat the charitable gift; (B. 47-9)

b. Where a condition precedent is performed shortly after death within the terms of the trust (B. 46-7) whether or not, discretion in the trustees is an element of the condition.

3. In addition to the conflict between the circuits the court below: (1) decided an important question of local law in a way probably in conflict with local statutes and decisions; (2) decided an important question of federal law which has not been but should be settled by this court; and (3) decided a federal question in a way probably in conflict with applicable decisions of this Court. Counsel do not attempt to meet petitioners' showing on these grounds for certiorari and do not even deny their validity except possibly by inference in asking that the petition be denied (S. 14).

4. The court recently granted a petition for writ of certiorari in a case from the First Circuit, *Merchants National Bank of Boston vs. Commissioner*, where as here the question is as to whether a gift is deductible when subject to possible defeat by the exercise of discretion by the trustees. The denial of the writ in this case does not square up with the allowance of it there. Both cases involve the same issue on the point of discretion and justice requires that the charities here involved be treated on the same level of justice, and have their day along with the trustee from Boston.

Wherefore petitioners pray that the order denying their petition for writ of certiorari may be reheard and the writ granted.

DANIEL W. NORRIS,
EMMET L. RICHARDSON
and PERRY J. STEARNS,
Petitioners,
By PERRY J. STEARNS,
Their Attorney.

State of Wisconsin, }
County of Milwaukee } ss

Perry J. Stearns, as attorney for petitioners hereby certifies that the foregoing petition for rehearing and accompanying brief is presented in good faith and not for delay.

PERRY J. STEARNS,
Attorney for Petitioners.

BRIEF ON PETITION FOR REHEARING

I. THE ARGUMENT IN OPPOSITION

Petitioner's brief was presented in orderly fashion in 5 main arguments separately lettered and headed, covering about 50 printed pages. The Solicitor General and associated counsel do not consider petitioners' arguments separately. In less than five full pages counsel give their argument for denial of the writ. The Solicitor General, with the Assistant Attorney General and three special assistants, making five lawyers in all, have confined the argument in opposition to one-tenth the printed space of that of petitioner's argument. (References to their brief are indicated by the letter S.)

Counsel say, "The regulations have received judicial approval" (S. 16 n. 2) as if we were contesting the regulations. Counsel apparently believe that petitioners are attacking the regulations. This is far from the truth. Petitioners support the plain language of Art. 47, Reg. 80 and show why the deduction claimed falls within its terms. (B. 13-24) Counsel do not meet our argument on its own level, or at all. There it stands. It can not do otherwise, since it has not been attacked.

Counsel by saying (pp. 10, 11 n. 2) that Regulation 105, Section 81.46 "in our view makes no change" in Article 47, Regulations 80 intimate that petitioners think otherwise. This is not true. (S. 17) The later regulation states in simpler language the natural meaning of the old. Unfortunately for the clarification of the law and for justice to petitioners, the failure of counsel to discuss the merits of our contentions, so eases their argument over the issues as to obscure, whether intentionally or not, the very fact that there are issues.

Counsel say (S. 10, 11, n. 2) the amendment of 1942 (B. 18) does not affect the instant case. We do not claim that it does. (B. 19) Counsel fail to reply to our argument that it does have a bearing. It shows the intent of Congress that death shall not freeze all rights, and that acts affecting the tax may still effectively be done after death. So Act and Regulation were amended to permit events occurring after death to speak as of the date of death but counsel choose not to discuss the implications thereof. They do not answer petitioners' argument as to the interpretation of the regulation that "the event shall have taken place before the deduction can be allowed."

Counsel say that the Commissioner, the Board of Tax Appeals and the Circuit Court of Appeals agreed below. This is interesting, but not conclusive. Counsel fail to remind the court that the Commissioner and the Board of Tax Appeals are part of the administrative machinery and to that extent at least are adverse to petitioners as taxpayers. The first and only real court of law in the case is the appeal court below. There the court was divided. (R. 188) Furthermore the court quotes at some length with no direct expression of disapproval. Attorney John E. Hughes (R. 183-4) who believes that if when the time of ascertainment of the tax arrives, the condition has been complied with, the bequest should be deductible.

Following the quotation of Attorney Hughes to show the desirable rule, the court points out that the congressional intent to prefer bequests to charity over estate taxes is one "of absolute priority" not to "be whittled down by judicial construction" or by approval "of the practice of the Commissioner of resolving doubts in favor of the Government." Thus the court below comforted the taxpayers by expressions of sound principles. This court has from time to time clearly enunciated the principle that doubts are to be resolved in favor of the taxpayer.

Gould vs. Gould, 245 U. S. 151, 38 S. C. 53 (B. 59)

The court below appears to have formed a strong impression that this principle is one honored by the Commissioner (ergo, by his legal advisers) in the breach. In fact, the court below must have thought the Commissioner was here resolving doubts in favor of the government which the law requires be resolved in favor of petitioners, or there would have been no occasion for the court below to say what it did. (R. 184) Having thus expressed them-

selves favorably to petitioners, why did the court reverse itself in the middle of its own opinion? Because: (1) loopholes should not be encouraged whereby after obtaining the deduction, the executors might not pay the bequest to charity; or (2) the path of the Commissioner should be made easy in the interests of accurate determination of the precise tax? No, this is not it. "Neither * * * uncertainty or possible avoidance of the charitable bequest * * * is here present." (R. 185) Why then the denial? Answer: the "gifts to charity are not absolute." (R. 185) So after condemning the Commissioner for resolving doubts against the taxpayers contrary to rule, the court commits the same error in this that the regulations do not say the gifts must be absolute. The regulation (Reg. 80, Act. 47) say they may be conditional. So the court below adopted the condemned "practice" of the Commissioner and decided to defeat the intent of Congress in this case by construing the law so as to require gifts to be mandatory when in fact the law and regulations say they may be conditional.

There is not only a conflict between the circuits but also a conflict within the Seventh Circuit. Certainly when a court of near-last resort charges the Commissioner of Internal Revenue of the United States with failure to follow the settled rule of construing doubts in favor of the taxpayer as a regular practice — a question of sufficient importance is presented to demand the attention of this Court.

Fair treatment of the taxpayer requires that more than superficial treatment be given to petitioners' reasoned contention that what the court below quotes Attorney Hughes as to the ideal rule, is in fact the rule under the express provisions of law and regulations. Perhaps counsel are persuaded that the times justify a government of men rather than laws. If such is their position they should frankly so state—as the doctrine is out of all harmony with the principles of our government. If that is the issue between us, counsel should have framed it in their brief below—so that we might have approached the Court on common ground. Since they have not met on their merits the issues as stated by us, we might then have met the issue made by them and brought it into the light of public discussion.

Counsel apparently seriously believe that petitioners could have satisfied Columbia Hospital with one cent. If

so why not with a ½ cent postage stamp or 1 red point. Counsel seem to think that one peppercorn however small, would constitute performance of the will. The court below (R. 185) recognized that Wisconsin law governs. We cite Wisconsin statutes and cases (B. 29-34) to show that in Wisconsin a trust is presumed to be imperative. About eight of these cases were not cited below. There is no rule against discovering new cases in working over a brief for the higher court. Yet counsel make no attempt to answer or distinguish these new cases. Their studied policy as evidenced by their brief is to overwhelm by indifference. They are content to say that "The court below after carefully reviewing the authorities (R. 185-9) concluded otherwise." (S. 11, n. 3) But Wisconsin statutes and decisions are conclusive as to Wisconsin law. The Circuit Court of Appeals is bound to accept Wisconsin decisions as to Wisconsin law, as does this court.

An illusory payment of the bequest to Columbia Hospital would not have satisfied the law (B. 33) or the legatee. If by Wisconsin law the bequest is imperative it is mandatory. The ruling of the court below to the contrary is obviously erroneous.

It is an unfair argument (S. 11, 12) that the trustees might have paid the bequest to private individuals and not to Norris Foundation. This assertion entirely begs the question. Court and counsel are here concerned with what was done and not what might have been done if the payment to Norris Foundation had not been made. If the trustees had dilly-dallied as in some of the cases where the deductions properly were not allowed, because the transfer was not made before the deduction could be allowed, we should not be claiming the deduction here. But petitioners properly complain that the fact that they might have delayed and retained the power to pay to private non-charitable purposes is used against them, when such is not the fact. The simple question presented by our petition for the writ is whether the transfer meets the terms of the regulations. Yet *mirabile dictu* counsel in their argument do not quote the regulations. To be sure they set them forth in the appendix. (S. 16) But they do not bother to turn them over, or hold them up to the light, to see the solid matter shining through the skin of the living thought of congress; and of the Commissioner—when he was speaking generally—on principle. So counsel

urge that the purpose of Congress be defeated—and that the deceased who acted on the offer of Congress in a reasonable manner go unrewarded—tricked out of an honest purpose. It is proposed to defeat Congress and testatrix not by a full showing on the merits—but by a shadow—a red herring—an illusion. To interpret the act and regulations allowing gifts subject to conditions precedent—so as to preclude all gifts where the condition occurs after death or is subject to discretion is to destroy as deductions a substantial percentage of legal conditional bequests. To state this proposition is to demonstrate that Congress never intended it. To say that the condition cannot depend upon human volition is obviously demonstrable as error: (1) because most conditions depend upon human action or intent; and (2) because neither the Congress nor the Commissioner set up any such unnatural restriction.

One searches Counsel's argument in vain for a statement of the general rules which should obtain as to discretionary conditional bequests—a reasoned explanation of the law and regulations to demonstrate why they do not apply to the facts in this case.

Counsel claim, "In similar situations (i.e. to petitioner's) courts have quite uniformly denied the claimed deductions." (Citing 3 cases) (S. 12). Counsel choose not to meet our contention that these cases are distinguishable. *Burdick vs. Commissioner*, 2 Cir., 117 F. (2) 972, (B. 56, 57) does not consider the contentions made by us. The court there clearly relied upon the second paragraph of Art. 47, Reg. 80, having to do with conditions subsequent, and entirely disregarded the paragraph of the article relating to conditions precedent. The gift there in question, as here, was subject to a condition precedent, and the provision of the article relating to conditions precedent, upon which we rely, was not applied or seemingly considered to have any bearing. Counsel for Commissioner forebear discussing this discrepancy in that case.

Mississippi Valley Trust Co. vs. Commissioner, 8 Cir., 72 F. (2) 197, 199, (B. 51), upon which counsel rely, is clearly distinguishable because no real trust was set up, such as was created by the will of Mrs. Norris. The gift there was merely precatory and rested with the ultimate beneficiaries. The gift when made was more a gift from their pockets than a gift by the decedent. Such is not the case under Mrs. Norris' will because the trustees as such

have no personal interest in the remainder, and the majority of them could not possibly have benefited if the gifts had been withheld. The transfers to Columbia Hospital and Norris Foundation were testamentary because provided for by the will of Mrs. Norris. By Wisconsin law they are imperative (B. 32), and by the established doctrine of relation back the transfers were those of the deceased. The claim that the trustees cannot be given any discretion by testatrix and the transfer must be mandatory in the sense of permitting no like exercise of discretion by the trustees is an innovation on the law, containing no support in the law of regulations. Counsel do not discuss these charges. *Robbins vs. Commissioner*, 1 Cir., 111 F. (2) 828 (B. 37) is so clearly distinguishable, we are surprised that it should be cited. It should not be necessary to cite a case where the transfer was the result of a compromise *de hors* the will and not testamentary in its nature.

That counsel read petitioner's brief we assume, because of the slight reference thereto. (S. 11, n. 3) The cases which they say we assert support our application for a writ are found in the petition, although it was also stated that in addition there were "a number of other cases discussed in the brief." (Pet. 2)

Counsel disregard eight additional cases cited in our brief as showing that this Court, and the Second, Third, Fifth, Sixth and Eighth Circuits recognize that the doctrine of relation back must be taken into account in tax cases as well as in general law. (B. 44) A tax act must take the general law as it finds it, and the general law is not to be distorted in order to support the exaction of the tax, however substantial.

An examination of our brief will disclose that additional cases were cited (B. 46), such as *Potter vs. Bowers*, 2 Cir., 89 F. (2) 687, where the transfer was dependent upon the creation of a corporation, and the corporation was not created until over two years after death. In *Mead vs. Welch*, 9 Cir., 95 F. (2) 617, the Commissioner strenuously contended that the value of the transfer could not be determined on the basis of any data known as of the date of death. There are at least ten cases cited in the brief in addition to those in the petition, to show that the theory upon which he court below based its decision is not in harmony with those of this court and other circuits. Coun-

sel disregard these cases and confine their attention to only those cited in the petition.

While the Solicitor General may be privileged to disregard these cases, if he believes such tactics politic, yet this Court should not disregard them.

The Court should grant the writ and require the Solicitor General to show why the principle in *Helvering vs. Safe Deposit & Trust Co. of Baltimore*, 316 U. S. 56, and *Helvering vs. Grinnell*, 294 U. S. 153 (B. 29) does not apply, requiring the Commissioner to take into account events subsequent to the testator's death insofar as they determine inclusions and exclusions under the United States estate tax law. Devoting their discussion only to the three cases cited in the petition, and leaving out the other cases showing a conflict between the circuits and this Court, counsel proceed to argue "that no such conflict exists." (S. 12) They say that in *Brown vs. Commissioner*, 3 Cir. 50 F. (2) 842 "the trustees were directed to distribute the funds as they might deem best." Yet they say the case is distinguishable, although their argument is based upon the fact that the payments made by petitioners were "at their discretion and option." (S. 11) We hesitate but are compelled to say that distinguishing between two cases so analogous is sophistry or casuistry on its face, and appears to us to be fallacy. To be sure, in the *Brown case*, the testator had conferences with his trustees and instructed them that they were to bear in mind his ideals (S. 12, 13), but there is no substantial distinction between these facts and the expression by the testatrix here "that the enterprises which I have been interested in be given the preference." (R. 4, 26, 146, 178) (B. 7) In both cases, the transfers were provided for by a will, a written instrument to which we must look to determine the powers, rights, and duties of the trustees. Counsel seek to explain away (S. 13) the fact that the Court held that the designation of the church related back to the decedent's death, first on the ground that Pennsylvania law, there applied, does not aply here and, second, that the "positive command of the decedent was thus supported." Driven to the necessity of distinguishing the two cases counsel have brought themslves to find that the direction to the trustees to distribute "as they might deem best" (S. 12) is a "positive command." (S. 13) Thus, in one short paragraph, the authors are able to bring themselves, for their purpose of

depriving petitioners of a hearing on the merits, to the point of having a clear expression of discretion twisted to a positive command. Counsel distinguish *Meierhof vs. Higgins,* 2 Cir., 129 F. (2) 1002, on the ground that by actuarial tables, the court was able to assign a definite value to the contingent remainder. This is truly irony. A transfer which is still contingent at the time when the deduction is to be allowed, is permitted to be deducted because of reasoned guess work set forth and published in experience tables. As a matter of fact, the charitable transfer might be substantially reduced because of actual experience being different from the norm. Here the Commissioner argues the deduction should be denied although no guess work is required because contingency has occurred prior to determination of the tax, and the value is determined to the exact cent. If the Court issues the writ of certiorari in this case examination into the law will disclose that the same principles which actuated the decision in *Ithaca Trust Co. vs. U. S.,* 279 U. S. 1514, apply here to permit the deduction.

The trustees, contrary to the contention of counsel, do not have it within their power to make another disposition of the fund. The transfers to Columbia Hospital and Norris Foundation were absolute; were made within the time provided by the regulation, and under the law as stated in *Brown vs. Commissioner,* 3 Cir. 50 F. (2) 842, and other cases upon which we rely. The transfer by them is conclusively presumed to be that of the decedent as of the day of her death.

Taxing laws are not intended to change general law, but are to be administered in the light of such general law as was done in the *Brown case,* and should be done here.

In *Smith vs. Commissioner,* 1 Cir., 78 F. (2) 897, the Court found that by Rhode Island law a compromise agreement related back conclusively as though contained in the will. Counsel again reiterate that the *Smith case* was overruled by the *Robbins case,* and have no answer for our statement that the *Robbins case,* dealing with Massachusetts law could not overrule the *Smith case* dealing with Rhode Island law. For counsel (S. 14) to distinguish the present case from the *Smith case* because in the present case there was no compromise is to confuse the issues without excuse. Counsel well know that we do not claim that there has been any compromise under the will of

Fannie W. Norris, Deceased. The point which counsel obscure is that the general doctrine of relation back is to be applied in the determination of taxes as well as in the determination of general rights. Counsel have no argument in answer to our showing that the county court in Wisconsin necessarily held, in permitting the deduction of the transfers in question for Wisconsin inheritance tax purposes, that the transfer related back to the date of death, (B. 38, 39), as if specifically provided for by will. That is the Wisconsin law of this case by which Commissioner is bound. The doctrine of relation back is one of general application and applies in all states in the absence of express provision to the contrary.

Counsel conclude "The decision is correct; there is no conflict; the petition should be denied." The very statement of this conclusion evidences what is palpable throughout the brief that it is devoted only to the first paragraph of reasons given by petitioners for the allowance of the writ (Pet. 2) namely, conflict between the circuits. The brief devotes no attention and makes no conclusion with respect to the remaining points 2-10, of the petition.

Rule 38 of the Rules of the Supreme Court, at 5 (b) provides that a review on writ of certiorari is a matter of sound judicial discretion and will be granted where there are special and important reasons therefor, such as (1) where a Circuit Court of Appeals has rendered a decision in conflict with a decision of another circuit, or (2) has decided an important question of local law in a way probably in conflict with applicable local decision, or (3) has decided an important question of Federal law which has not been but should be settled by this Court, or (4) has decided a Federal question in a way probably in conflict with applicable decisions of this Court, or (5) has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision.

Counsel have devoted their entire attention to the first reason: i.e., that of conflict. It appears from our brief that not only is there this conflict, but also the Circuit Court of Appeals has decided a question of local law in a way probably in conflict with applicable Wisconsin decisions; has decided an important question of Federal law which has probably been settled by this Court in a different man-

ner, or if it has not been settled should be settled by this Court.

The *ratio decidendi* in the Board of Tax Appeals was that the deduction could not be had because supposedly the transfer was subject to power of diversion under the second paragraph by Reg. 80, Art. 47. But the appeal court found there was no power of "diversion." (R. 181) The confusion in the law in this important subject is illustrated by the confusion in the opinions below. The subject of what conditional bequests are deductible is so important that this court should take jurisdiction and give that solid study to the law and regulations which the issues require in order to do justice to innocent taxpayers and charities which are being misled continually over the land because of a misleading inconsistency between regulations and practise.

II. COMMISSIONER SEEKS REPUDIATION OF CONGRESSIONAL OFFER ACCEPTED BY DECEDENT

The estate tax law permitting the deduction of charitable bequests is an offer by Congress to prospective testators. *Y.M.C.A. vs. Davis*, 264 U. S. 47, 50; 44 S. C. 291, 292.

The regulations are part of the Act and therefore part of the offer. *Helvering vs. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115; 59 S. C. 423, 426.

The Act and regulations (Reg. 80, Art. 47) offer to prospective testators the deduction of conditional charitable bequests in computing the estate taxes on their estates, providing, however, that the conditional event occur before the tax is computed. The prospective testator desiring to accept the offer puts his affairs in order and makes a will valid under the law of Wisconsin. He dies and his trustees perform the condition before the estate tax return is filed and the tax computed. Then, at last, the offerer, by its representative, the Commissioner of Internal Revenue, says "Oh no you don't." The Commissioner thus repudiates the offer and says that the regulation does not say what it seems to say. Although the regulation does not say that the condition need be imperative or mandatory, and does not prohibit conditions dependent upon the exercise of discretion, yet, such prohibitions are in effect added to the

Act and regulations by the disallowance of the deduction, and the decision below. It is a familiar rule of law that the parties to a contract are bound by the writing. Further, the writing will be given its ordinary meaning except where it produces an ambiguous result. The rule is well stated in Restatement, Contracts, 310, Sec. 230, as follows:

> "The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

So, the offer that the deduction might be taken if the conditional event occur "before the deduction can be allowed," should be given its ordinary meaning. For the Commissioner to raise doubts which are not expressed in the offer, and to impose tests not expressed in the integration accepted by decedent is to repudiate the contract. Repudiation by a government or its agents involves the honor of the nation. It is imperative, therefore, that this attempted repudiation of the offer by the Commissioner be subjected to careful examination by this Court, and that petitioners be given the benefit of the contract accepted by their decedent, in accordance with the ordinary meaning of the language of the offer.

The repudiation by an administrative official of an open offer made by Congress is so offensive to the honor of the country, and raises so important an issue as to make imperative a careful examination of the law and the facts by the highest court in the land.

III. CERTIORARI GRANTED IN ANALOGOUS CASE

From the report for October 21, 1943, Prentice-Hall Federal Tax Service, Par. 61,001, it appears that on or about May 3, 1943 certiorari was granted in the case of *Merchants National Bank of Boston vs. Commissioner*, 132 F. (2) 483, No. 30, October Term, 1943, decided by United States Circuit Court of Appeals, 1 Cir., Dec. 30, 1942. The writ was granted on the petition of the taxpayer.

It appears from the opinion of Judge Mahoney that the

will of the decedent, Ozro M. Field, gave the net income to his wife for life with the right to pay to her or for her benefit such sums from the principal of the trust fund as the trustee in *its sole discretion* should deem wise and proper for the comfort, support, maintenance, and happiness of the wife, and that such discretion should be exercised with liberality to the wife, and should consider her welfare, comfort and happiness prior to the claims of residuary beneficiaries under the trust. The Court says:

> "Here there can only be an invasion of the corpus of the trust if, in the sole discretion and wisdom of the trustee, an invasion of the principal is deemed necessary for the happiness of the widow."

The judge seems to have injected the word "necessary" as the will, quoted earlier, merely said "wise and proper." Since the Court has granted certiorari in a case where the possibility that the residuary charitable beneficiary may receive nothing, dependent upon the exercise of discretion by the trustee, the reasons are even stronger why certiorari should be granted in this case where the discretion of the trustees has already been exercised, and the amount that the charitable transferees receive is absolute in fact and definite and certain in amount.

CONCLUSION

It is an old adage that we all eat at least a peck of dirt before we die. It is common to hear military leaders say that an objective gained at an appalling cost in lives was cheaply had. So courts of law become hardened to the run of the mill and find it important to keep the calendar clear. We recognize that alert men are more apt to obtain justice and that he who sleeps on his rights is apt to lose them. But we do not expect that one who brings himself into court in the correct manner after lengthy proceedings earnestly urged with citation of supporting authority shall be bounced out again without a hearing. Even review by certiorari though not a matter of right is based on sound judicial discretion.

Sound judicial discretion within Supreme Court Rule 38 requires that the very important questions here raised, based upon long established rules of law be heard and an effort made to establish the true rule of law in a field where now the Commissioner rules as he deems advisable,

that is in his discretion, without regard to the plain language of regulations having the supposed dignity of law.

A summary of the brief in opposition shows that the Commissioner has not attempted to deny the construction we give to Reg. 80, Art. 47, nor that the deduction is one favored by the Congress and the Act, nor that a provision for charity is to be liberally, not narrowly, construed, that by Wisconsin law the transfer was treated as relating back to the date of death; that a discretionary power is not illegal; that the conditions in question were precedent and not subsequent, and that the transfers were mandatory and testamentary. All these things have sound judicial support and respect for court and counsel requires the opposition to treat them in a serious, not a frivolous manner. Petitioners in good faith have stated their argument with reasoning which they believe meritorious. At least it represents an honest struggle on behalf of truth and justice. It merits more than contempt in reply.

We call upon the Court to break the reign of silence which threatens to devastate petitioners' rights under the estate tax law. It is sometimes said that courts will spend a great deal of time and effort to discover the kernel of truth hidden in a mountain of chaff submitted in the form of a brief. We feel that petitioners' mountain of truth lies buried under a glume of chaff, and that the truth and justice of petitioners' case cries out through the interstices of the brief in opposition.

We respectfully urge the Court to take jurisdiction, grant the petition for certiorari and provide for the argument of the case along with the analogous case of *Merchants National Bank of Boston vs. Commissioner*, 132 F. (2) 483, *supra*.

Respectfully submitted,

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